Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

PHILIP WILLIAMSON, ITZIK RIEF, RONDA KIRLIN AND THOMAS PAINTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit, reversing the district court, correctly held that:

(A) Employees who are prevented from claiming overtime under the Fair Labor Standards Act (FLSA) by their employer's fraudulent threats of termination are ***not*** protected by the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3); and, therefore,

(B) The employees' state common law fraud claims to recover that same overtime are ***not*** preempted by the FLSA's comprehensive remedial scheme, which conflicts with the state common law scheme in three substantial respects: opt-in versus opt-out classes; the statute of limitations; and, if the Eleventh Circuit is correct, the recoverability of punitive damages.

2. Whether the Ninth Circuit -- in conflict with the Eleventh Circuit, but in agreement with the Seventh Circuit -- is correct that punitive damages are recoverable for a violation of the FLSA's anti-retaliation provision.

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all parties to the proceeding before the United States Court of Appeals for the Ninth Circuit:

General Dynamics Corporation, Appellee below, has no parent corporation. No publicly held company owns ten percent or more of the stock of General Dynamics Corporation.

Philip Williamson, Itzik Rief, Ronda Kirlin and Thomas Painter, Appellants below, are individuals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Background: The *Sena* Case and Settlement 3

The Proceedings Below 6

REASONS FOR GRANTING THE PETITION 8

I. THE DECISION BELOW UNDULY RESTRICTS THE FLSA'S ANTI-RETALIATION PROTECTIONS BY EXCLUDING COVERAGE FOR THREATS OF FUTURE ECONOMIC RETALIATION 12

II. THE NINTH CIRCUIT'S DECISION THAT PLAINTIFFS MAY ASSERT STATE COMMON LAW FRAUD CLAIMS TO ENFORCE FLSA RIGHTS CONFLICTS WITH THE FLSA'S COMPREHENSIVE REMEDIAL SCHEME AND THE LEGISLATIVE INTENT OF CONGRESS IN PASSING THE PORTAL-TO-PORTAL ACT OF 1947 . . . 19

CONCLUSION 27

APPENDIX A:

Opinion, *Williamson, et al. v. General Dynamics Corporation*, 208 F.3d 1144 (9th Cir. April 12, 2000) 1a

APPENDIX B:

Memorandum Decision and Order (unpublished), *Williamson, et al. General Dynamics Corporation*, No. 97-1466 E (AJB) (S.D. Cal. April 3, 1998) 32a

APPENDIX C:

Order Denying Petition for Rehearing and Petition for Rehearing En Banc, *Williamson, et al. v. General Dynamics Corporation*, (9th Cir., filed May 23, 2000) 39a

APPENDIX D:

Excerpts of relevant provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. 40a

TABLE OF AUTHORITIES

FEDERAL CASES

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990),*cert. denied*, 498 U.S. 1068 (1991) 3, 4, 5

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 10, 25

Auer v. Robbins, 519 U.S. 452 (1997) 4

Barfield v. Madison County, 984 F. Supp. 491 (S.D. Miss. 1997) 22

Berry v. 34 Irving Place Corp., 4 Wage & Hour Cas. (BNA) 564, 8 Lab. Cas. (CCH) ¶ 62,265 (S.D.N.Y. 1944) 20

Brennan v. Maxey's Yamaha, 513 F.2d 179 (8th Cir. 1975) 17

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) 20

Childers v. City of Eugene, 120 F.3d 944 (9th Cir. 1997) 4

Conner v. Schnuck Markets, 121 F.3d 1390 (10th Cir. 1997) 16

EEOC v. Romeo Community Schools, 976 F.2d 985 (6th Cir. 1992) 16, 17

EEOC v. White & Sons Enters., 881 F.2d 1006 (11th Cir. 1989) 17

Edgar v. MITE Corp., 457 U.S. 624 (1982) . . . 13

Felder v. Casey, 487 U.S. 131 (1988) 12

Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992) 13

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 12, 13

Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999); *cert. denied*, 120 S. Ct. 936 (2000) 16

Lanza v. Sugarland Run Homeowners Ass'n, 97 F. Supp. 2d 737 (E.D. Va. 2000) 12

Legutko v. Local 816 Int'l Bhd. of Teamsters, 606 F. Supp. 352 (E.D.N.Y. 1985) 18

Lerwill v. Inflight Motion Pictures, Inc., 343 F. Supp. 1027 (N.D. Cal. 1972) 21, 22, 23

Madrigal v. Green Giant, No. C-78-157, 1981 U.S. Dist. LEXIS 15325 (E.D. Wash. July 27, 1981) 23

Marshall v. Frozen Assets, Ltd., 513 F. Supp. 591 (E.D. Mo. 1981) 22

Mitchell v. Robert DeMario Jewelry, 361 U.S. 288 (1960) 9, 15, 17

Nettles v. Techplan Corp., 704 F. Supp. 95 (D.S.C. 1988) 22

Petras v. Johnson, No. 92-CIV 8298 (CSH), 1993 U.S. Dist. LEXIS 8464 (S.D.N.Y. June 22, 1993) 22

Pilot Life Ins. Co. v. DeDeaux, 481 U.S. 41 (1987) 14

Roman v. Maietta Constr., 147 F.3d 71 (1st Cir. 1998) 22

Snapp v. Unlimited Concepts, 208 F.3d 928 (11th Cir. 2000) 11, 12, 26, 27

Soler v. G&U, Inc., 690 F.2d 301 (2d Cir. 1982) 10, 17

Sperling v. Hoffman-LaRoche, Inc., 24 F.3d 463 (3d Cir. 1994) 24, 25

Stanley v. City of Tracy, 120 F.3d 179 (9th Cir. 1997) 4

Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) 22

Tombrello v. USX Corp., 763 F. Supp. 541 (N.D. Ala. 1991) 22

Travis v. Gary Community Mental Health Ctr., 921 F.2d 108 (7th Cir. 1990) 8, 12, 27

Valerio v. Putnam Assocs., 173 F.3d 35 (lst Cir. 1999) 16, 17

Wisconsin Dep't of Indust., Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986) 14

DOCKETED CASES

Sena v. General Dynamics Corp., No. 91-0965-B (AJB) 2, 3, 4, 5, 6

FEDERAL STATUTES

Fed. R. Civ. P. 23 . . . . . 10, 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1441 7

28 U.S.C. § 1446 7

61 Stat. 84 (1947) 20

Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.*, ... *passim*

STATE STATUTES

Cal. Code Civ. Proc. § 382 10

735 Ill. Comp. Stat. 5/13-205 26

N.Y. C.P.L.R. § 213 26

LEGISLATIVE HISTORY

H.R. Rep. No. 80-71 (1947), 1947 U.S. Code Cong. Serv. 1029. ..... 11, 24, 25

PETITION FOR A WRIT OF CERTIORARI

General Dynamics Corporation (General Dynamics) respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit holding that Section 215(a)(3) of the Fair Labor Standards Act (FLSA) provides no remedy to employees who are prevented by their employer's threats of termination from claiming FLSA overtime by joining a pending FLSA opt-in class action and, therefore, the employees' common law fraud claims seeking that overtime are not preempted by the FLSA's comprehensive remedial scheme.

OPINIONS BELOW

The opinion of the Ninth Circuit, 208 F.3d 1144 (9th Cir. 2000), is reprinted at Appendix A, Pet. App. 1a-31a. The order of the Ninth Circuit denying the petition for rehearing and petition for rehearing en banc is reprinted at Appendix C, Pet. App. 39a.

The unpublished opinion of the United States District Court for the Southern District of California, holding, *inter alia*, that plaintiffs' claims are preempted by the FLSA, is reprinted at Appendix B, Pet. App. 32a-38a.

JURISDICTION

The Court of Appeals entered its decision on April 12, 2000. On April 21, 2000, petitioners

timely filed a petition for rehearing and petition for rehearing en banc. On May 23, 2000, the Court of Appeals denied the petition for rehearing and the petition for rehearing en banc. Pet. App. 39a. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves those sections of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.*, that comprise the FLSA's comprehensive remedial scheme, 29 U.S.C. §§ 206-07, 215-16, 255-56, 260, including the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3). The relevant sections of the FLSA are reprinted at Appendix D, Pet. App. 40a-46a.

STATEMENT OF THE CASE

The gravamen of plaintiffs' complaint, brought as a purported class action under state common law, is that plaintiffs were intimidated and coerced by their employer, through fraudulent threats and promises, not to join a pending FLSA action seeking unpaid overtime compensation. The decision below, in relevant part, was that plaintiffs were not protected by the FLSA's anti-retaliation provision and that, therefore, plaintiffs' common law fraud claims for unpaid overtime were not preempted by the FLSA.

Background: The *Sena* Case and Settlement

In July 1991, a group of General Dynamics salaried exempt[1/] employees brought a class action under the FLSA to recover unpaid overtime compensation. *Sena, et al. v. General Dynamics Corp.*, No. 91-0965-B (AJB) (S.D. Cal.) (*Sena*). The *Sena* plaintiffs alleged that General Dynamics had violated the FLSA by permitting deductions to be taken from salaried exempt employees' salaries for absences of less than a full day. (R. 186.) The effect of such deductions, the *Sena* plaintiffs alleged, was that the exempt status of all General Dynamics salaried employees was forfeited, thus requiring that they all be paid overtime for work over 40 hours in any workweek.

The legal basis of the *Sena* action was the Ninth Circuit's then recent decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert.*

1/ "Salaried exempt" employees are those employees working in executive, administrative, or professional positions and compensated on a salary basis, who are thereby exempt from the overtime provisions of the FLSA, *i.e.*, they need not be paid additional compensation for work in excess of 40 hours per week.

denied, 498 U.S. 1068 (1991)[2/], which held that the mere "theoretical possibility" of impermissible pay deductions was sufficient to impose liability for overtime pay on an employer such as General Dynamics. *See Auer v. Robbins*, 519 U.S. 452, 456-60 (1997) (citing the "theoretical possibility" standard of *Abshire* and other cases as one side of a split in the circuits). In *Auer*, however, this Court rejected the *Abshire* standard for FLSA liability under the salary basis test, in favor of a narrower standard that would "avoid[ ] the imposition of massive and unanticipated overtime liability" on employers. 519 U.S. at 459-61. It is an irony of the instant case that plaintiffs seek to recover for allegedly being defrauded of rights that were based on a decision -- *Abshire* -- that has been overruled and thoroughly discredited. *See Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) ("*Auer* therefore implicitly overrules *Abshire*"); *Stanley v. City of Tracy*, 120 F.3d 179, 183 (9th Cir. 1997) (similar).

In contrast to a normal class action, such as one governed by Rule 23 of the Federal Rules of Civil Procedure, the FLSA's unique class action procedures require a claimant affirmatively to opt into the lawsuit by written consent in order to be a class member. 29 U.S.C. § 216(b). The FLSA's

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2/ The *Sena* complaint specifically cited the *Abshire* decision. (R. 576.)

affirmative opt-in requirement applied to those General Dynamics employees who wished to participate in *Sena*. (*See* R. 186-87.)

In 1993, four years before this Court overruled *Abshire*, a tentative settlement was reached in *Sena*. (R. 86, 186.) Pursuant to that settlement, District Judge Rudi Brewster issued notices dated September 30, 1993 to all potential claimants (including plaintiffs and the putative class in this lawsuit) informing them of their right to opt into the settlement. (R. 86, 186-94.) The opt-in notice recited the allegations of General Dynamics' alleged failure to properly compensate salaried employees under the FLSA. (R. 186.) The notice also listed the names and telephone numbers of plaintiffs' counsel to contact with questions. (R. 187.) The notice stated that the deadline for opt-ins was November 15, 1993. (*Id.*) The named plaintiffs here and the members of the putative class they seek to represent did not opt into the *Sena* suit.

On March 20, 1995, Judge Brewster entered an order retaining jurisdiction over the *Sena* settlement: "should further proceedings in [this case] become necessary o[r] desirable, any party may initiate it . . . ." (Ex. A attached to Appellee's Mot. to Take Judicial Notice before the Ninth Circuit.) Judge Brewster formally approved the *Sena* settlement on July 25, 1995, and continued to hear matters relating to the *Sena* settlement until

July 1996. (Exs. B-C attached to Appellee's Mot. to Take Judicial Notice before the Ninth Circuit.)

The Proceedings Below

As stated above, the named plaintiffs in this case are former employees of General Dynamics who were eligible to join *Sena* and participate in the *Sena* settlement, but who did not. (R. 148.) Plaintiffs received notice of the *Sena* settlement and an "opt-in" form. To participate in the settlement, the opt-in form had to be completed, signed on oath, and returned. (R. 148, 184-94.) Plaintiffs allege that they did not return the form because General Dynamics threatened plaintiffs that they "would suffer career harm" if they asserted claims for overtime wages or if they joined the *Sena* action. (R. 148, 161.) The putative class is alleged to consist of persons who were eligible to join *Sena* but who failed to join "because of statements at the workplace to the effect that asserting that right would jeopardize an employee's position with General Dynamics." (R. 148.) Plaintiffs allege that these threats constitute common law fraud because inherent in the threats was a promise of a "viable career" with General Dynamics, but made when General Dynamics had already decided to close the division where plaintiffs worked. (R. 156-60.)

Rather than pursuing their claims for threatened retaliation and interference with the *Sena* settlement before Judge Brewster or filing

their own FLSA complaint, plaintiffs sued in California state court for common law fraud, seeking unpaid overtime compensation and punitive damages. General Dynamics removed the case to the United States District Court for the Southern District of California, pursuant to 28 U.S.C. § § 1441, 1446. (R. 16-19.)

District Judge William Enright dismissed plaintiffs' amended complaint[3/] with prejudice, holding: (1) plaintiffs' claims that General Dynamics promised them "viable careers" were too vague to state a claim for fraud; (2) plaintiffs' claims were time barred; and (3) plaintiffs' claims were preempted by the FLSA. Judge Enright ruled that the FLSA provides the exclusive remedy for plaintiffs' claims and that plaintiffs cannot "circumvent the statutory remedy by re-labeling their claims as common law torts." (Pet. App. 38a.) Only the third ground -- preemption -- is involved in the instant petition.

Plaintiffs appealed. In pertinent part, the Ninth Circuit reversed the trial court's determination that plaintiffs' claims are preempted by the FLSA. The primary basis for the Ninth

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3/ Plaintiffs' original complaint was dismissed for failure to plead fraud with particularity under Rule 9 of the Federal Rules of Civil Procedure. (R. 141-44.)

Circuit's ruling was its view that the FLSA's anti-retaliation provision does not apply to employer threats intended to discourage employees from asserting their FLSA rights in the future. Because General Dynamics' alleged threats were "not covered by a FLSA provision," the Ninth Circuit reasoned, plaintiffs' claims did not conflict with the FLSA's enforcement scheme and therefore were not preempted by the FLSA. (Pet. App. 19a-20a.) The Ninth Circuit also held that despite the differing class action procedures between the FLSA (opt-in classes) and state law (opt-out classes) and differences in the applicable statutes of limitation, no preemptive conflict existed between the FLSA and state law fraud actions. (*Id.* at 19a-21a.) On the issue of punitive damages, the Ninth Circuit accepted the Seventh Circuit's decision in *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108 (7th Cir. 1990), that punitive damages are available for FLSA section 215(a)(3) violations. The Ninth Circuit concluded that there is no conflict between the FLSA and state common law fraud. (Pet. App. at 19a-20a.)

REASONS FOR GRANTING THE PETITION

This case presents important questions regarding the rights of employees and the scope of the remedies available to them under the FLSA, including a split in the circuits on the issue of whether punitive damages are available under the FLSA. A proper consideration of the FLSA's

comprehensive remedial scheme and the legislative intent underlying that remedial scheme leads to the conclusion that the FLSA preempts plaintiffs' state law fraud action to recover FLSA overtime.

The FLSA contains an anti-retaliation provision that forbids an employer from firing or discriminating against employees who assert FLSA rights. 29 U.S.C. § 215(a)(3). This Court long ago recognized that the legislative purpose of the anti-retaliation provision was to allow employees to assert FLSA rights without "fear of economic retaliation." *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960). But the decision below construed the FLSA's anti-retaliation provision very narrowly, holding that threats of future economic retaliation are not covered by the FLSA, and therefore that the FLSA does not preempt plaintiffs' state law fraud claims. The Ninth Circuit's decision creates an untenable anomaly: An employer may shield itself from FLSA liability simply by preventing employee overtime claims from being asserted in the first place by making threats of termination or other retaliation.

If the Ninth Circuit's decision is allowed to stand, employers will be allowed to successfully intimidate employees into not asserting their FLSA rights, including their right to opt into pending FLSA class actions. According to the Ninth Circuit, these intimidated employees have no remedy under the FLSA. This Court should grant the petition and

clarify that the FLSA's anti-retaliation provision does protect employees from threats of retaliation, as well as actual retaliation. *See Soler v. G&U, Inc.*, 690 F.2d 301, 302-03 (2d Cir. 1982) ("[u]ndoubtedly, threats of retaliation are also prohibited" by Section 215(a)(3)).

This case also presents the important question of whether the FLSA's comprehensive remedial scheme, including its unique class action procedures, may be circumvented by plaintiffs who choose, in the words of the district court below, to "re-label[] their [FLSA] claims as common law torts." In enacting the FLSA, and especially in amending its remedial provisions in the Portal-to-Portal Act of 1947, Congress struck a balance between the interests of employees and employers. In particular, the FLSA contains a class action mechanism and a statute of limitations that strikingly differ from state law class actions. First, class actions under the FLSA are "opt-in" actions, which individual plaintiffs must affirmatively elect to join before they become members of the class. In contrast, like Fed. R. Civ. P. 23(b)(3), class actions under California law and the law of many states are "opt-out" actions, in which individuals automatically become and remain members of the certified class. *See* Cal. Code Civ. Proc. § 382 (West 1999). Second, and related, the FLSA has its own statute of limitations, which continues to run until an individual joins a pending FLSA action or files her own suit. Again in contrast, under the rule of

American Pipe, the pendency of an opt-out class action, like a Rule 23 class action, generally tolls the applicable statute of limitations for absent class members. Third, the remedial provisions of the FLSA are compensatory, not punitive. Liquidated damages are available, but they are compensatory in purpose, available only in specific circumstances, and strictly limited in amount. However, punitive damages, if the Eleventh Circuit is correct (*see* below at 26-27), are not available under the FLSA, whereas common law fraud actions have the full availability of punitive damages.

The decision below, rejecting FLSA preemption, allows plaintiffs to circumvent all of these carefully drawn remedial limitations. In holding that the named plaintiffs in this case may enforce their FLSA rights in a purported opt-out class action brought under state common law fraud, the Ninth Circuit has displaced the FLSA's comprehensive remedial scheme and has ignored the congressional intent that underlay the Portal-to-Portal Act amendments to the FLSA. *See* H.R. Rep. No. 80-71 (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1029 (discussing FLSA's unique opt-in requirement, its statute of limitations, and its liquidated damages provisions). Moreover, the Ninth Circuit's ruling, in agreement with the Seventh Circuit, that punitive damages are available under the FLSA, conflicts with the Eleventh Circuit's ruling that they are not. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933 (11th

Cir. 2000) (punitive damages not available for violation of the FLSA's anti-retaliation provision); *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108, 111-12 (7th Cir. 1991) (punitive damages available). *See also Lanza v. Sugarland Run Homeowners Ass'n.*, 97 F. Supp. 2d 737 (E.D. Va. 2000) (acknowledging split in circuits; holding punitive damages not available).

By accepting this petition, this Court will have the opportunity to resolve important questions relating to the enforcement of the FLSA. The Ninth Circuit's decision is simultaneously too restrictive of employees' FLSA rights to be free from threats of economic retaliation and too permissive in allowing the carefully drawn remedial scheme of the FLSA to be circumvented.

I. THE DECISION BELOW UNDULY RESTRICTS THE FLSA'S ANTI-RETALIATION PROTECTIONS BY EXCLUDING COVERAGE FOR THREATS OF FUTURE ECONOMIC RETALIATION.

Under the Supremacy Clause, the doctrine of preemption requires any state law that "interferes with or is contrary to federal law" to yield to federal law. *Felder v. Casey*, 487 U.S. 131, 138 (1988). To avoid preemption, "it is not enough to say the ultimate goal of both federal and state law" is the same. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Rather, a state law is preempted

"if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Id.*; *see also Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 108-09 (1992) (state law preempted under conflict preemption even though it furthered federal goals of occupational health and safety).

This is particularly true when Congress has created a "careful balance" between competing policy objectives. *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982). In *Edgar*, for example, the Supreme Court explained that in enacting the Williams Act, "Congress intended to strike a balance between the investor, management, and the takeover bidder." *Id.* The Court held that a state law's pro-management provisions were preempted because:

> [The provisions] upset the ***careful balance*** struck by Congress and . . . therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (emphasis added). Similarly, in *International Paper*, the Supreme Court held that the federal Clean Water Act preempted state common law claims because they "circumvent[ed] the [federal regulatory structure], thereby ***upsetting the balance*** of public and private interests so carefully

addressed by the Act." 479 U.S. at 494 (emphasis added).

Where Congress has struck such a balance, state law "conflicts" with federal law "whenever two separate remedies are brought to bear on the same activity." *Wisconsin Dep't of Indust., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (citation omitted). Plaintiffs cannot pursue "regulatory or judicial remedies [under state law] for conduct prohibited [under federal law]." *Id.* The federal remedy is exclusive because "the range and nature of [the federal] remedies that are and are not available is a fundamental part of the comprehensive system established by Congress." *Id.* at 287 (citation omitted); *see also Pilot Life Ins. Co. v. DeDeaux*, 481 U.S. 41, 54 (1987) (where Congress has enacted comprehensive enforcement procedures, courts may reasonably conclude that "policy choices [are] reflected in the inclusion of certain remedies and the exclusion of others . . . .").

According to the Ninth Circuit, the FLSA's anti-retaliation provision does not protect an employee who, solely because of threats of retaliation by her employer, does not assert her rights under the FLSA. As shown below, the Ninth Circuit's holding conflicts with the pronouncements of this Court and others, which have interpreted Section 215(a)(3) broadly. Section 215(a)(3) applies here and it provides the exclusive remedy for the allegedly fraudulent threats, thus preempting

plaintiffs' duplicative, but conflicting, state common law claims.

The anti-retaliation provision of the FLSA provides that it is unlawful for an employer:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). As this Court has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees" to forgo the assertion of FLSA rights. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960). The FLSA's anti-retaliation provision serves the congressional purpose of assuring compliance with the FLSA through enhanced enforcement. *Id.*

The Ninth Circuit, in its attempt to provide a remedy to these particular plaintiffs, has done so at the expense of the FLSA's anti-retaliation protections for employees generally. The Ninth Circuit acknowledged that plaintiffs' fraud claims would be an obstacle to the enforcement of the

FLSA -- and therefore preempted -- if Section 215(a)(3) covered these claims and if the FLSA was the exclusive remedy for "rights duplicated by or equivalent of" FLSA rights. (Pet. App. 15a.) However, the Ninth Circuit held that "there is no conflict preemption because the anti-retaliation provision does not apply . . ." to the employer threats of retaliation alleged in this case. *Id.* at 20a. *See also id.* at 19a ("In this case, however, GD's allegedly fraudulent conduct was not covered by a FLSA provision."); *id.* at 15a ("Even under *Lambert's* [*Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000)] broad reading of the FLSA's anti-retaliation provision, the appellants' career fraud claims are not covered.").

The Ninth Circuit's restrictive interpretation of the FLSA's anti-retaliation provision -- that threats of retaliation alleged by plaintiffs did not merit protection under Section 215(a)(3) -- conflicts with both the purpose and the text of that provision.

First, the central purpose of the FLSA's anti-retaliation provision is to encourage employees to assert their FLSA rights without fear of reprisal. In accordance with that principle, most of the circuits have taken an expansive view of Section 215(a)(3). *See Valerio v. Putnam Assocs.*, 173 F.3d 35, 41 (lst Cir. 1999) (expanding § 215(a)(3) to cover informal complaints); *Conner v. Schnuck Markets*, 121 F.3d 1390, 1393-94 (10th Cir. 1997) (same); *EEOC v.*

Romeo Community Schools, 976 F.2d 985, 989-90 (6th Cir. 1992) (same); *EEOC v. White & Sons Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (same). In *Valerio*, for example, the court noted the remedial purpose of Section 215(a)(3) and discussed the "bizarre" result that would occur if the FLSA failed to protect informal complaints of FLSA violations -- such a rule would create "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally." *Valerio*, 173 F.3d at 43.

The Ninth Circuit has created just such a "bizarre" incentive for an employer. Under the Ninth Circuit's holding that threats of retaliation are not covered by Section 215(a)(3), an employer has an incentive to threaten to retaliate against employees who are about to exercise their FLSA rights, but who have not yet done so. This result makes no sense, and it is contrary to this Court's observation that Congress' purpose in enacting Section 215(a)(3) was to prevent the "***fear*** of economic retaliation" from discouraging the exercise of FLSA rights. *See Mitchell*, 361 U.S. at 292 (emphasis added).

The Ninth Circuit's holding also conflicts with the decision of the Second Circuit in *Soler v. G & U, Inc.*, 690 F.2d 301, 302-03 (2d Cir. 1982). In *Soler*, the court noted that "undoubtedly threats of

retaliation are also prohibited . . . as are efforts to obtain withdrawal of FLSA claims by threats of retaliation." *Id.*; *see also Legutko v. Local 816 Int'l Bhd. of Teamsters*, 606 F. Supp. 352, 359 (E.D.N.Y. 1985) (threat of discharge justifies relief under FLSA's anti-retaliation provision; allowing it to "go unnoticed would be to largely undermine the function of § 215(a)(3)").

Second, Section 215(a)(3), by its express terms, protects employees who are "about to testify" in an FLSA proceeding and, therefore, covers the threats of retaliation alleged in this case. The amended complaint alleges that plaintiffs and the putative class members received notice of the *Sena* settlement, including an opt-in declaration required to be signed on oath, and that plaintiffs would have joined the *Sena* action by returning the opt-in declaration but for the alleged threats of retaliation. Thus, plaintiffs were "about to testify" by declaration in an FLSA proceeding -- *i.e.*, in the *Sena* action -- at the time they were allegedly threatened. Because Section 215(a)(3) explicitly protects employees who are "about to testify," the Ninth Circuit's decision is inconsistent with both the letter and the intent of the FLSA.

Indeed, the Ninth Circuit's holding leaves employees who are subjected to threats of retaliation with potentially no remedy for the employer's action: Under the Ninth Circuit's holding, the FLSA's anti-retaliation provision does

not protect them. And, unless the employer's conduct happens to fall within a state law or tort, the employees will have no state remedy either.

II. THE NINTH CIRCUIT'S DECISION THAT PLAINTIFFS MAY ASSERT STATE COMMON LAW FRAUD CLAIMS TO ENFORCE FLSA RIGHTS CONFLICTS WITH THE FLSA'S COMPREHENSIVE REMEDIAL SCHEME AND THE LEGISLATIVE INTENT OF CONGRESS IN PASSING THE PORTAL-TO-PORTAL ACT OF 1947.

The Ninth Circuit said that plaintiffs' claims were not preempted by the FLSA because, according to the panel, the remedies and procedures available under the FLSA and California law were fundamentally the same. However, the respective remedies and procedures are radically different in at least three major respects: opt-in versus opt-out classes, the statute of limitations, and punitive damages. The Ninth Circuit's holding ignores the legislative intent underlying the important 1947 amendments to the FLSA and, as a result, conflicts with almost every reported decision that has addressed the issue of the FLSA's exclusive remedy.

Early in the history of the FLSA, courts confronted with the issue of whether the FLSA preempted state statutory remedies decided that the states were without power to provide additional

remedies. In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), for example, this Court held that the FLSA's remedial structure precluded an award of interest because the FLSA provided for liquidated damages but not interest. *Id.* at 714-15. This Court reasoned that because liquidated damages and an award of interest each serve a similar purpose, Congress must have intended to preclude the recovery of interest when it enacted the FLSA. *Id.*; *see also Berry v. 34 Irving Place Corp.*, 4 Wage & Hour Cas. (BNA) 564, 8 Lab. Cas. (CCH) ¶ 62,265 (S.D.N.Y. 1944) (states were without power to provide additional remedies because Congress intended to provide a uniform rule of damages; rejecting argument that overtime claims sounded in contract, for which prejudgment interest was recoverable).

If there were any doubt concerning the exclusivity of the FLSA's remedies, that doubt was laid to rest when Congress amended the FLSA in the Portal-to-Portal Act of 1947. 61 Stat. 84 (1947), 1947 U.S. Code Cong. Serv. 81, (codified at 29 U.S.C. §§ 251-262 and amending portions of 29 U.S.C. § 201 *et seq.*) ("the Act"). Through the Act, Congress cut back on the rights originally afforded by the FLSA. For example, prior to the Act: (i) the applicable state statute of limitations governed claims brought pursuant to the FLSA; (ii) the rule on class actions was liberal, modeled after the Federal Rules; and (iii) the double damages recovery was available in all cases, without regard to

culpability. *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1029 (N.D. Cal. 1972).

In the Act, however, Congress (i) restricted class recoveries by requiring employee-plaintiffs to file with the court a consent in writing to become a party (*i.e.*, an opt-in requirement) (§ 216(b)); (ii) imposed a two-year federal statute of limitations (three years for wilful violations) (§ 255); and (iii) restricted the award of liquidated damages (§ 260). *Lerwill*, at 1029. As one court has observed, in enacting the Act:

> Congress carried on the delicate process of balancing the competing policies of (1) strict enforcement of the statutory objective of insuring minimally acceptable pay levels and (2) the avoidance [to employers] of the economic disruption of unanticipated liabilities. In so doing Congress created a remedy conditioned with both advantages and disadvantages to the claimant. It would be difficult indeed to find any purpose in that careful process if alternative remedies, varying with variations of state law were also to be available in any case in which the alternative seemed more advantageous to the plaintiff-employee seeking to enforce his § 207 rights.

Id.; *see also* 29 U.S.C. § 251(a) (amending FLSA, in part, to remedy "wholly unexpected liabilities" that "would bring about financial ruin of many employers and seriously impair the capital resources of many others"); *Thompson v. Sawyer*, 678 F.2d 257, 278 (D.C. Cir. 1982) (FLSA's countervailing purpose is to avoid the imposition of "unjustly harsh" liabilities on employers); *Marshall v. Frozen Assets, Ltd.*, 513 F. Supp. 591, 595 (E.D. Mo. 1981) (referring to "the balance struck by Congress under the Portal-to-Portal Act" between the rights of employees and employers).

With this as its backdrop, federal courts that have since addressed the issue are virtually unanimous in their conclusion that the exclusive remedies available to an employee to enforce legal rights created by the FLSA are the statutory remedies provided therein.[4/]

4/ *See, e.g., Roman v. Maietta Constr.*, 147 F.3d 71, 76 (1st Cir. 1998) ("the FLSA is the exclusive remedy for enforcement of rights created under the FLSA") (citations omitted); *Barfield v. Madison County*, 984 F. Supp. 491, 509 (S.D. Miss. 1997) (same); *Petras v. Johnson*, No. 92-CIV 8298 (CSH), 1993 U.S. Dist. LEXIS 8464, at *4 (S.D.N.Y. June 22, 1993) (same); *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991) (same); *Nettles v. Techplan Corp.*, 704 F. Supp. 95, 100 (D.S.C.

(continued...)

The Ninth Circuit's ruling, however, will subject employers to state law tort claims, such as the fraud claim here, that provide remedies far beyond those that Congress intended and, in some cases, remedies that Congress expressly rejected. The state law remedies sought in this case conflict with the FLSA's remedial scheme in three essential respects, which warrant a finding of conflict preemption in this case.

(1) ***Opt-in versus opt-out classes***. The FLSA provides for an opt-in class action procedure rather than the traditional opt-out procedure employed in Fed. R. Civ. P. 23 and in the typical state class action statutes. Under the FLSA, each plaintiff must affirmatively opt into the pending class action to become a member of the class:

> (b) . . . An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action

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4/ (...continued)
1988) (same); *Madrigal v. Green Giant*, No. C-78-157, 1981 U.S. Dist. LEXIS 15325, at *7-9 (E.D. Wash. July 27, 1981) (same); *Lerwill*, 343 F. Supp. at 1029 (same).

> unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought . . .

29 U.S.C. § 216(b). The differences between the opt-in and opt-out class action procedures are substantial. The FLSA's opt-in procedure is much more restrictive, which reflects the congressional intent "to define and limit the jurisdiction of the courts" in FLSA actions. H.R. Rep. No. 80-71 (1947), 1947 U.S. Code Cong. Serv. 1029, 1029. *See Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 463, 468-69 (3d Cir. 1994) (an opt-out class action "differs in important respects from the opt-in class permitted by section 16(b) of FLSA"; FLSA's "restrictive provisions" reflect congressional intent to limit employers' FLSA liability). In opt-out class actions, employees automatically become and remain class members unless they affirmatively opt out of the class. Among other things, allowing FLSA claims to be litigated as opt-out class actions would dramatically increase an employer's potential liability. That may or may not be a good policy choice, but it is ***not*** the choice Congress made in the FLSA.

(2) ***Statute of limitations.*** The FLSA's statute of limitations differs markedly from most state statutes in two respects. First, as a corollary to the FLSA's opt-in class, the statute of limitations continues to run on the claims of any individual

class member -- *i.e.*, the statute is not tolled -- until that individual files with the court a written consent to join the pending action. 29 U.S.C. § 256. In contrast, the filing of an opt-out class action typically tolls the statute of limitations during the pendency of the class action. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The FLSA's rejection of tolling reflects the conscious decision of Congress in the 1947 Portal-to-Portal Act. *See* H.R. Rep. No. 80-71, 1947 U.S.C.C.S. at 1035. ("As to the individual claimant, the action is deemed to be commenced when he is named as a party to the action. In other words, the commencement of an action does not stop the running of the statute for all those who later become parties."); *Sperling*, 24 F.3d at 469 ("Thus, when Congress enacted the Portal-to-Portal Act of 1947 . . . it severely restricted the claims an employee could make for back wages by various means, including a strict statute of limitations.").

In addition to adopting a strict statute of limitations with no provision for tolling, Congress intended that the FLSA should be governed by "a uniform Federal statute of limitations" to redress the "confusion" caused by the then existing lack of uniformity. H.R. Rep. No. 80-71, 1947 U.S.C.C.S. at 1035. The decision below frustrates congressional intent because it permits the substitution of state statutes of limitation in actions to enforce FLSA rights, which was the pre-1947 practice that Congress expressly rejected in

amending the FLSA in 1947. The Ninth Circuit considered the difference between the FLSA's and California's statutes of limitation to be insignificant, only "three years compared with two years." (Pet. App. 20a.) But that misses the point: Congress wanted uniformity. Moreover, many states have longer fraud limitations periods than California -- for example, New York or Illinois, where the fraud limitations periods are six years and five years, respectively.[5/] The Ninth Circuit's decision, therefore, means that the limitations difference between a state fraud action and an FLSA action is not merely "three years compared with two years."

(3) ***Punitive damages***. The FLSA's remedial scheme also differs from the remedies available under state common law fraud with respect to the availability of punitive damages. The Eleventh Circuit has carefully analyzed the FLSA's remedial structure and has concluded that it reflects a congressional decision to provide civil plaintiffs with compensatory relief only, and not punitive damages. *Snapp v. Unlimited Concepts*, 208 F.3d 928, 933 (11th Cir. 2000) (punitive damages are not available for Section 215(a)(3) violations). In determining that there was no conflict between plaintiffs' common law fraud claim and the FLSA, the Ninth Circuit agreed with the Seventh Circuit

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5/ N.Y. C.P.L.R. § 213; 735 Ill. Comp. Stat. 5/13-205.

that punitive damages are available for Section 215(a)(3) violations, citing *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108, 112 (7th Cir. 1990).[6/] This circuit split on the issue of whether punitive damages are available for Section 215(a)(3) violations should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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6/ The Eleventh Circuit's decision in *Snapp* to the contrary was handed down on April 5, 2000, seven days before the Ninth Circuit's decision in this case.

APPENDIX A

PHILIP WILLIAMSON; ITZIK *RIEF*; RONDA KIRLIN; THOMAS PAINTER,
Plaintiffs-Appellants,
v.
GENERAL DYNAMICS CORPORATION,
Defendant-Appellee.

No. 98-55783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

April 12, 2000

Before D.W. NELSON, Chief Judge, BOOCHEVER and T.G. NELSON, Circuit Judges.

D.W. NELSON, Circuit Judge.

Phillip Williamson and three former General Dynamics ("GD") employees appeal the district court's order dismissing their lawsuit with prejudice. They claim that the district court erred because: (1) the Fair Labor Standards Act ("FLSA") does not preempt their common law fraud and misrepresentation claims; (2) they deserved an opportunity to amend their state claims in light of the preemption concerns; (3) California's three-year statute of limitations has not run; and (4) they have stated a valid claim for fraud under California law. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The appellants are former long-term employees of GD who were improperly classified as "salaried exempt" from California and federal overtime laws. On September 28, 1993, the appellants were entitled to join the settlement of a FLSA-based, class-action lawsuit concerning GD's failure to pay overtime wages, *Sena v. General Dynamics Corp.* In order to participate in the *Sena* settlement under the FLSA, the appellants were required to sign and return an opt-in form by November 15, 1993.

The appellants failed to join the *Sena* settlement because GD allegedly threatened to harm their jobs if they joined. Management told the employees that by joining the lawsuit they would be committing "career suicide," "cutting their balls off," and other similar statements. GD made representations that it would act in a "law abiding" way with regard to wages and that the appellants had "viable careers" with the company. As early as 1991, however, GD allegedly knew that it would have to sell or close the Convair Division where the appellants worked. Yet as late as April 1994, the GD executive in charge of the division wrote: "Let me once again make it clear that we have not been sold, [and] there has been no decision to shut down this plant. . . ." On July 1, 1994, GD announced it was closing the Convair Division.

The appellants' lawyers have filed the following lawsuits on behalf of other parties:

Argo

In April 1995, 101 GD employees who had not opted into *Sena* filed a state court lawsuit, *Argo v. General Dynamics & Arthur Veitch*, alleging state civil rights violations, tortious interference, and fraud. GD was unable to remove the case to federal court because the plaintiffs also had named GD's managers as co-defendants. On May 1, 1997, a jury awarded 97 employees compensatory damages of $1.77 million and punitive damages of $99 million. The state trial court denied GD's motion for a new trial and affirmed the jury's damages award. The case is on appeal. The appellants are not parties to that lawsuit.

Harman

In November 1995, GD employees filed a FLSA lawsuit in federal court attempting to recover unpaid overtime. Over 135 employees opted-into this lawsuit, *Harman v. General Dynamics*, including the four named appellants in this case. *Harman* sought back wages from 1992 to 1996 under FLSA, but not under a fraud theory. A proposed settlement in *Harman* was before the district court.

Adams

In March 1997, the *Argo* plaintiffs filed another lawsuit in state court, *Adams v. General Dynamics*. They alleged claims of wage and career fraud, but did not name GD managers as co-defendants. GD removed *Adams* to federal court on diversity grounds. The case was assigned to Judge Enright (the district judge in this case), who on June 26, 1997, stayed the case until *Argo* becomes final. The *Adams* plaintiffs abandoned their appeal to this court.

Williamson

On June 27, 1997 (the day after Judge Enright stayed Adams), GD employees filed a lawsuit in state court alleging fraud and misrepresentation (the "wage fraud" and "career fraud" claims) under California law. On August 7, 1997, GD removed the case to federal court on diversity grounds. Judge Enright, sua sponte, issued an order staying this case until *Argo* becomes final because of res judicata concerns. Both sides, however, objected to the stay because the plaintiffs in *Williamson* and *Adams* are not the same. On September 10, 1997, the district court lifted the stay.

On November 26, 1997, after briefing and hearings on the issue, the district court ordered the *Williamson* plaintiffs to plead their fraud claims with

more particularity under Fed. R. Civ. P. 9(b). On December 24, 1997, the appellants filed their first amended complaint. The amended complaint makes two basic claims:

(1) *Wage fraud* - GD pledged to be "honest, trustworthy, and law abiding" with regard to paying correct overtime (because of a government contracts scandal), yet stopped paying overtime. The district court termed this claim, "wage fraud."

(2) *Career fraud* - GD represented that this was a "career job," that there would be business "all the way into the year 2000," and that as of April 1994 "we have not been sold, [and] there has been no decision to shut down this plant." Yet the appellants claim that documents introduced in *Argo* proved those statements to be false, that GD knew it was going to close the plant when it told its employees not to jeopardize their careers with GD by opting into the *Sena* lawsuit. The documents in *Argo*, however, are under a protective order, and GD refuses to release them for this case. Finally, the appellants argue that they did not discover the falsity of these statements until GD announced that it was closing the plant on July 1, 1994. The district court labeled this claim, "career fraud."

After the appellants amended their complaint, GD filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). On April 3, 1998, the district court granted the motion, finding that the fraud claims were: (1)

too vague; (2) barred by California's three-year statute of limitations; and (3) preempted by the Fair Labor Standards Act ("FLSA"). The appellants timely appealed.

II. STANDARD OF REVIEW

We review the district court's decision regarding preemption de novo. *See Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207, 1211 (9th Cir. 1999).

We review a dismissal based on statutes of limitations de novo. *See Ellis v. City of San Diego*, 176 F.3d 1183, 1188 (9th Cir. 1999).

We review a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. See *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

III. DISCUSSION

This case presents an issue of first impression in this Circuit - whether the FLSA preempts a common-law fraud claim. Given the lack of discussion of the wage fraud claims in the appellants' briefs or at oral argument, we find that the appellants have abandoned their wage fraud claims. *See Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988) ("It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned."). Therefore, the remainder of this opinion only will address the appellants' career fraud claims. We believe that the appellants' career fraud claims are not preempted because the appellants were never subject to FLSA's anti-retaliation provision. We also find that the appellants' career fraud claims are not barred by the statute of limitations and are not too vague to state a claim. In light of our ruling on preemption, we will not address whether the district court erred in not allowing the appellants leave to amend their complaint.

A. *Preemption*

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl.2."Consideration of the issues arising under the

Supremacy Clause 'start[s] with the assumption that the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (plurality) (quoting *Rice v. Santa Fe Elevator Corp.*, 67 S. Ct. 1146, 331 U.S. 218, 230, 91 L. Ed. 1447 (1947)).

The Ninth Circuit has based its preemption analysis on the Supreme Court's three categories: (1) *express preemption* - "where Congress explicitly defines the extent to which its enactments preempt state law"; (2) *field preemption* - "where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy"; and (3) *conflict preemption* - "where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997) (citing *English v. General Elec. Co.*, 496 U.S. 72, 78-80, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)).

Although we adhered to this categorical framework in *Industrial Truck*, we recognized that the categories are not "'rigidly distinct.'" *Industrial Truck*, 125 F.3d at 1309 (quoting *English*, 496 U.S. at 79 n.5, 110 S. Ct. 2270). In *Cipollone*, a plurality

of the Court said, "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 516, 112 S. Ct. 2608 (citations and quotations omitted). *Cipollone* said that Congress's intent may be express or it may be implied through the structure and purpose of a statute. *See id.* The Ninth Circuit has echoed the Court's focus on Congress's purpose: "Congressional intent to preempt state law must be clear and manifest." *Industrial Truck*, 125 F.3d at 1309 (citing *Law v. General Motors Corp.*, 114 F.3d 908, 909-10 (9th Cir. 1997) (citations omitted)).

1. *FLSA*

a. *Purpose*

The Fair Labor Standards Act of 1938 contains the following finding:

> The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . .

29 U.S.C. § 202(a) (1994). Many authorities have recognized that the principal purpose of the FLSA is "'to protect all covered workers from substandard wages and oppressive working hours.'" *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981)). Furthermore, we have recognized that "[t]he FLSA's minimum wage and overtime provisions are central among the protections the Act affords to workers." *Adair*, 185 F.3d at 1059. In *Barrentine*, the Supreme Court distinguished the FLSA from other federal statutes designed to strike a balance between employees and employers:

> In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "'[a] fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay.'"

Barrentine, 450 U.S. at 739, 101 S. Ct. 1437 (quoting *Overnight Motor Transp. Co. v. Missel*, 62 S. Ct. 1216 , 316 U.S. 572, 578, 86 L. Ed. 1682,

(1942) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt))).

b. *Savings Clause*

In addition to protecting workers by establishing a minimum wage and maximum hours, the FLSA contains a "savings clause" that enables states and municipalities to enact more favorable wage, hour, and child labor legislation. See 29 U.S.C. § 218(a).[1/]

1/ The statute says:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.

(continued...)

c. *Anti-Retaliation Provision*

Finally, the FLSA contains an "anti-retaliation provision" that prohibits employers from retaliating against employees for filing complaints about violations of the Act. It states that it is unlawful:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

We recently held that the FLSA's anti-retaliation provision protects not only employees who have filed complaints in court or with an agency such as the Department of Labor but also employees who have complained to their employers. *See Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc), *cert. denied*, ___ U.S. ___, 120 S. Ct. 936, 145 L. Ed. 2d 814, (2000). *Lambert* said that the FLSA "is a remedial statute . . . [that] must

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1/ (...continued)
29 U.S.C. § 218(a).

be interpreted broadly." *Lambert*, 180 F.3d at 1003 (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S. Ct. 698 597, 88 L. Ed. 949, (1944)). Furthermore, *Lambert* stated that the purposes of the anti-retaliation provision are: (1) "to provide an incentive for employees to report wage and hour violations by their employers"; *id.*; (2) "'to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance'"; *Id.* at 1004 (quoting *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989)); and "to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." *Id.*

2. *District Court's Decision*

As a threshold matter, the district court failed to analyze this case under the Supreme Court's categorical framework. The district court conceded that the "authorities are not uniform on this issue," yet it found that the FLSA preempted the appellants' fraud claims. The district court asserted four reasons: (1) The FLSA is a comprehensive statute, except for allowing states to provide more generous wage and hour laws; (2) "The FLSA is the exclusive remedy for claims that duplicate or are the equivalent of rights protected by the FLSA" (citing *Lerwill v. Inflight Motion Pictures*, 343 F. Supp. 1027 (N.D. Cal. 1972)); (3) The appellants' fraud claims "reduce to claims that

[the appellants] would lose their jobs if they participated in the *Sena* FLSA action," and the FLSA's anti-retaliation provision is broad enough to protect their rights; and (4) The wage fraud claims duplicate a claim that they were not paid overtime under FLSA. The district court concluded that the FLSA "does not allow employees to circumvent the statutory remedy by re-labeling their claims as common law torts."

3. *Preemption Analysis*

a. *Express and Field Preemption*

GD does not argue that the FLSA expressly preempts a common law fraud claim. No statutory language expressly preempts the appellants' claims. GD also does not argue that FLSA preempts the entire field of law. The statute contains a "savings clause" that allows states and municipalities to enact stricter wage and hour laws. *See* 29 U.S.C. § 218(a). Although this lawsuit does not invoke California's wage and hour laws, the FLSA's "savings clause" is evidence that Congress did not intend to preempt the entire field. Under field preemption, it does not matter whether the common law claim conflicts with the statute. *See Industrial Truck*, 125 F.3d at 1309. The common law claim is preempted because the statute provides exclusive remedies. While the FLSA may be a comprehensive remedy, as the district court argues, the "savings

clause" indicates that it does not provide an exclusive remedy.

b. *Conflict Preemption*

There are two types of conflict preemption: (1) "where it is impossible to comply with both state and federal requirements"; and (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Industrial Truck*, 125 F.3d at 1309. GD argues that the appellants' fraud claims present an obstacle to the FLSA's purposes and enforcement, citing the statute's "language, structure, and underlying goals." GD, however, does not cite any Ninth Circuit case that supports its contention that fraud claims are preempted by the FLSA.

GD's best argument, given the Ninth Circuit's broad reading of the statute in *Lambert*, is that the FLSA's anti-retaliation provision covers the fraud claims. If the district court is correct in arguing that (1) the anti-retaliation provision covers these claims and (2) the FLSA is the exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA, then the fraud claims would be an obstacle to the enforcement of the FLSA. The district court's assumptions, however, are incorrect.

Even under *Lambert's* broad reading of the FLSA's anti-retaliation provision, the appellants' career fraud claims are not covered. *Lambert*

interpreted the anti-retaliation provision to include employees, not only who have filed complaints with the courts or the appropriate agency, but also who have complained to their employers. *See Lambert*, 180 F.3d at 1004. The FLSA refers to employees who have "filed any complaint or instituted or caused to be instituted any proceeding under this chapter, or ha[ve] testified or [are] about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). Basically, *Lambert* expanded the definition of "filing" to include a complaint to a supervisor.

The facts of *Lambert* are much different from this case. The *Lambert* employees called the Department of Labor for advice, complained to their supervisors orally, hired an attorney, and notified their employer in writing of an FLSA violation. *See Lambert*, 180 F.3d at 1007. After these complaints, the employees were fired and replaced. *See id.* at 1001-02. In *Lambert* we held that "so long as an employee communicates the substance of his allegations to the employer" the anti-retaliation provision applies, though we declined to articulate a rule for the degree of specificity necessary to constitute filing a complaint within the meaning of the statute. *Id.* at 1008.

In this case, the appellants never filed a complaint with an agency or the courts. They never complained to their supervisors of a FLSA violation or notified the Department of Labor. They never instituted or caused to be instituted any

proceedings because they were not parties to the class-action litigation in *Sena*. They were invited to opt-into that lawsuit, but relied on GD's allegedly fraudulent assertions that they held career jobs and that the Convair Division would remain open. The appellants argue the fraud occurred after the failure to pay overtime and after *Sena* settled the FLSA claims. Thus, even under *Lambert*, GD's allegedly fraudulently conduct would not be actionable under the anti- retaliation provision.

At oral argument, GD contended that two recent cases from other circuits, *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999) and *Kendall v. City of Chesapeake, Virginia*, 174 F.3d 437 (4th Cir. 1999), suggest that the FLSA governs the appellants' claims. As with *Lambert*, we find both cases distinguishable.

In *Valerio*, the First Circuit found that the plaintiff's written complaint to her supervisor constituted a complaint under the FLSA's anti-retaliation provision. *See Valerio*, 173 F.3d at 45. The court did not subject the plaintiff's state law claims of retaliation to a preemption analysis because it did not consider whether the state retaliation claims survived once it had reinstated the federal retaliation claim. *See id.* at 46 n.7. The appellants in this case never complained to their supervisor, and their state fraud claims do not merely duplicate possible federal retaliation claims.

Valerio is like *Lambert* and therefore not factually analogous to this case.

In *Kendall*, the Fourth Circuit found that the plaintiffs could not use a § 1983 claim to enforce their rights to overtime compensation under the FLSA. *See Kendall*, 174 F.3d at 443. The plaintiffs in *Kendall* signed a release of their rights under the FLSA, so they attempted to enforce their rights under § 1983. The court conducted a § 1983 analysis, concluding that the FLSA's "unusually elaborate" remedial scheme prevented a § 1983 claim. *See id.* *Kendall* is not a case about federal preemption of state law; rather, it is about whether another federal statute (Section 1983) can support a claim that clearly falls under the FLSA. Furthermore, *Kendall* never reached the merits of the issue in this case - whether a state fraud claim is preempted by the FLSA. In *Kendall*, the district court dismissed the plaintiffs' state law claim on jurisdictional grounds but without prejudice. *See id.* at 443-44. Neither the district court nor the appellate court addressed whether the FLSA preempted the state fraud claims.

In this case, the district court relied on an even weaker precedent, *Lerwill v. Inflight Motion Pictures*, 343 F. Supp. 1027 (N.D. Cal. 1972), in order to conclude that the appellants' fraud claims are preempted because the "FLSA is the exclusive remedy for claims that duplicate or are equivalent of rights protected by the FLSA." *Lerwill* is a

dubious authority. It is a 1972 district court case that is not even about preemption. *Lerwill* never mentions the word "preemption," and it does not rely on a preemption framework. It was about the plaintiff's effort to get a more favorable remedy. The plaintiff sued for breach of contract of a collective bargaining agreement because of unpaid overtime. *See id.* at 1028. This theory directly implicated the FLSA's statutory provisions.

In this case, however, GD's allegedly fraudulent conduct was not covered by a FLSA provision. Nor are the appellants in this case avoiding the FLSA in order to seek a more favorable remedy. The FLSA's anti-retaliation provision actually offers broader remedies than state fraud claims because the anti-retaliation provision allows the recovery of attorneys' fees. The other remedies are the same. In 1977, Congress amended section 216(b) to allow plaintiffs who prove retaliation under section 215(a)(3) to obtain "legal and equitable relief" under state law.[2/] At least one

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2/ Section 216(b) says: "Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal and equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional

(continued...)

other circuit has interpreted this relief to include compensatory, punitive, and emotional distress damages. *See, e.g., Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993); *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). The only advantage of a state fraud claim over a FLSA claim is a longer statute of limitations (three years compared to two years). *Compare* Cal. Civ. Proc. Code § 338(d) *with* 29 U.S.C. § 255(a).

The district court's preemption analysis does not hold up under the categorical preemption framework. There is definitely no express or field preemption. And there is no conflict preemption because the anti-retaliation provision does not apply even under *Lambert* 's broad definition. Under a categorical preemption analysis, the career fraud claims are not preempted.

c. *The Purpose of the FLSA*

Mindful that we should not adhere only to a categorical preemption analysis, we also find that the career fraud claims are not contrary to the purpose of the FLSA. GD argues that the purpose of the FLSA was to protect employers as well as

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2/ (...continued)
equal amount as liquidated damages." 29 U.S.C. § 216(b).

employees, and therefore the appellants' fraud claims would upset the careful balance established by the statute. Indeed, Congress amended the FLSA in 1947 in order to mitigate the impact of the statute on American industry by limiting retroactive relief and including a statute of limitations. *See* 29 U.S.C. §§ 251-261. Despite these amendments, the Supreme Court and the Ninth Circuit have consistently found that the central purpose of the FLSA is to enact minimum wage and maximum hour provisions designed to protect employees. *See Barrentine*, 450 U.S. at 739, 101 S. Ct. 1437; *Adair*, 185 F.3d at 1059.

The appellants' career fraud claims do not conflict with purpose of the FLSA of protecting employees. Nor do they upset by any balance created by amendments to the statute. Fraud claims by employees do not conflict with the FLSA any more than claims for wrongful death, assault, or murder. Claims that are directly covered by the FLSA (such as overtime and retaliation disputes) must be brought under the FLSA. That is not the case here. Thus, neither the district court nor GD has presented a convincing case that the career fraud claims conflict with the purposes of the FLSA.

d. *Other Analogies*

GD also argues that the *Sena* settlement was under the exclusive jurisdiction of Judge Brewster. If GD allegedly committed fraud in inducing the

appellants not to join the settlement, GD contends that the appellants should have gone to Judge Brewster and asked him to reopen the settlement agreement. GD supports this argument with a securities case in which California plaintiffs who were part of a class action lawsuit were barred from filing a lawsuit in California court for fraud and misrepresentation based on the allegation that the defendant encouraged them not to opt-out of the class action. *See In re VMS Sec. Litig.*, 103 F.3d 1317, 1320 (7th Cir. 1996). The Seventh Circuit held that the exclusive remedy in that case was for the California plaintiffs to return to the district court. *See id.* at 1323.

As a procedural matter, GD makes this exclusive jurisdiction argument for the first time on appeal. Even if the argument is not waived, it is substantively flawed. In securities cases such as the one cited by GD, the plaintiffs had the opportunity to opt-out of the class and were therefore subject to the court's jurisdiction. The appellants in this case, however, were never under the exclusive jurisdiction of Judge Brewster. They were never parties to the *Sena* settlement. They only had the opportunity to *opt-in* to the settlement. Furthermore, the appellants (along with 136 GD employees) asked GD to reopen the *Sena* settlement just three weeks after learning the Convair Division was closing. GD's attorneys denied their requests, testifying to this fact during the *Argo* litigation. We therefore deny GD's request to take judicial notice

of documents from *Sena* and reject GD's argument that Judge Brewster had exclusive jurisdiction over the appellants' claims.

Better analogies appear in the preemption cases involving the field of nuclear energy regulation. In a 1990 preemption case, the Supreme Court held that the anti-retaliation provision of the Energy Reorganization Act ("ERA") did not preempt a state law claim for intentional infliction of emotional distress. *See English*, 496 U.S. at 90, 110 S. Ct. 2270. *English* said: "[W]e think the District Court failed to follow this Court's teaching that '[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.'" *Id.* at 89, 110 S. Ct. 2270 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 105, 109 S. Ct. 1661, 104 L. Ed. 2d 86, (1989)). Furthermore, *English* said:

> [W]e find no "clear and manifest" intent on the part of Congress . . . to pre-empt all state tort laws that traditionally have been available to those persons who, like petitioner, allege outrageous conduct at the hands of an employer . . . . [That] would require us to conclude that Congress has displaced not only state tort law, which is at issue in this case, but also state criminal law, to the extent that such criminal law is applied to

> retaliatory conduct at the site of a nuclear employer.

Id. at 83, 110 S. Ct. 227. *English* is instructive not only because it is a recent Supreme Court precedent on preemption but also because *Lambert* used the ERA's anti-retaliation provision as an analog for interpreting the scope of the FLSA's anti-retaliation provision. *See Lambert*, 180 F.3d at 1005 n.3 (citing *MacKowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) and its interpretation of the ERA's anti-retaliation provision).

Finally, there is a simpler way to look at the preemption issues in this case. The appellants' career fraud claims are nothing more than fraud claims about a plant closing. We have typically allowed state fraud claims when companies allegedly lie or misrepresent the status of a plant closing. *See Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1418 (9th Cir. 1991) (finding that the employees' claims of fraud, misrepresentation of facts, and intentional infliction of emotional distress were not preempted by the Labor Management Relations Act). This case is about whether GD is guilty of fraud and misrepresentation because of its statements about the appellants' "career jobs" and about not closing the Convair Division. The *Sena* settlement of the FLSA claims was merely an impetus for this alleged

fraud and may factor into the amount of damages to which the appellants are due.

The preemption issues in this case have important federalism concerns, and we are reluctant to allow a plaintiff to circumvent the FLSA's comprehensive statutory remedies. Preemption issues, however, must be decided on a case-by-case basis. In this case, the appellants' career fraud claims are not categorically preempted because the appellants never complained or instituted any proceedings under the anti-retaliation provision; the career fraud claims also are not contrary to the FLSA's purpose of protecting employees. Thus, after conducting a thorough preemption analysis and consulting analogous legal precedents, we reverse the district court's finding of federal preemption as to the career fraud claims.

B. *Statute of Limitations*

The district court also argued that the appellants failed to file their fraud claims within the three-year statute of limitations under Cal. Civ. Proc. Code § 338(d). The district court argued that the appellants, who filed their complaint on June 27, 1997, "were on notice of the purported fraud in September 1993" when they could have opted-in to the *Sena* settlement. The district court found that at the time of the *Sena* settlement the appellants "had the necessary information upon which to

conclude that the company had not properly compensated them for all hours worked."

California Civil Procedure Code Section 338(d) provides that a cause of action for fraud "is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Accrual may also be defined as when the "the plaintiff discovers, or has reason to discover the cause of action." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 457, 981 P.2d 79 (1999). Once the statute of limitations is tolled, § 338(d) "does not in any way limit a plaintiff's ability to recover for events that occurred more than three years prior to accrual or filing." *County of Marin Ass'n of Firefighters v. Marin County Employees Retirement Ass'n*, 30 Cal. App. 4th 1638, 36 Cal. Rptr. 2d 736, 744 (1994).

In this case, the appellants did not have reason to discover GD's alleged fraud and misrepresentations until the company announced that the plant was closing on July 1, 1994. The *Sena* settlement is irrelevant to the appellants' knowledge of GD's alleged fraud. They had no reason to doubt GD's statements about their jobs or the status of the Convair Division until the announcement of the plant closing. The only thing the appellants were on notice of in September 1993 was that GD may not have paid them enough overtime. They learned nothing at that time about their job security or the plant closing. The district

court's holding about the statute of limitations misstates the appellants' case, conflating the fraud claims with a garden-variety FLSA claim. The appellants could not have discovered the alleged fraud until July 1, 1994. Therefore, given that the appellants filed their claim on June 27, 1997, they were within the three-year statute of limitations.

C. *Failure to State a Claim*

The district court found that the appellants' allegations were too vague to support their fraud claims, relying on the following dicta: "'Promises too vague to be enforced will not support a fraud claim any more than they will one in contract.'" (quoting *Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 23 Cal. Rptr. 2d 793, 800 (1993), *disapproved on other grounds, Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (1994)). Under our de novo review of the district court's dismissal, we reverse in light of the admonition that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *See Morley*, 175 F.3d at 759.

The appellants alleged two basic fraud claims: fraudulent misrepresentation and fraudulent

concealment.[3/] There are two principal reasons why the district court erred in granting GD's 12(b)(6) motion. First, *Rochlis* is distinguishable. In that case, the court found that promises of "appropriate" financial rewards and "active and meaningful" participation in creative decisions were

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3/ Misrepresentation, under California law, requires that: (1) the defendant must have made a representation as to a past or existing material fact; (2) the representation must have been false; (3) the defendant must have known the representation was false when made; (4) the defendant must have made the representation with an intent to defraud the plaintiff - with the purpose of inducing the plaintiff to rely on it; (5) the plaintiff must have been unaware of the falsity of the representation and acted on the truth of the representation; and (6) as a result of relying on the representation, the plaintiff must have sustained damages. *See Witkin*, Summary of Cal. Law (9th ed. 1998) Torts, §§ 676-677, at 778-79. Concealment requires that: (1) the defendant concealed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant concealed or suppressed the fact with an intent to defraud; (4) the plaintiff was unaware of the fact and would have acted if he or she had known about it; and (5) the concealment caused the plaintiff to sustain damage. *See id.* at Torts § 697, at 799-800; Cal. Civ. Code §§ 1572(3), 1710(3).

too vague. *See Rochlis*, 19 Cal. App. 4th at 215, 23 Cal. Rptr. 2d at 800. In this case, however, the appellants presented numerous statements by GD that they had "career jobs" and the Convair Division would remain open through the year 2000. Vague promises about financial rewards and creative control are far different from specific promises of job security.

Second, the outcome of *Argo* plays a pivotal role in proving that GD knowingly misrepresented facts and concealed information about the plant closing with an intent to prevent the appellants in this case from joining the *Sena* settlement. In *Argo*, the trial judge denied GD's motion for a new trial because "there was substantial evidence before the jury that [GD] misled its employees and clear and convincing evidence that there was fraud involved." Although the appellants in this case concede that *Argo* "was tried on narrower fraud claims than alleged by the *Williamson* plaintiffs," they allege that "*Williamson* includes the same type of fraud claims which were tried to verdict favoring the plaintiffs in *Argo*." The evidence in *Argo* about GD's allegedly knowing misrepresentations, however, is under seal, and GD refuses to release it for this lawsuit. We assume from GD's refusal that the evidence in *Argo* is probative of the alleged fraud in this case.

In this case, the district court's instincts were correct. The district court issued a sua sponte order staying this case pending the outcome in *Argo*

because of res judicata concerns, but it lifted the stay when both parties objected because the parties are different. *See Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) (noting that res judicata only applies if the parties are the same). If *Argo* becomes a final judgment, however, the appellants may be able to preclude GD from relitigating some of the fraud issues in this case by invoking offensive non-mutual collateral estoppel.[4/] *Argo* is still on appeal in the California courts. Since the decision in *Argo* is not final and documents in *Argo* are critical to proving fraud in this case, we recommend that on remand the district court issue a stay in this case pending the outcome in *Argo*. Once *Argo* has become final, the parties can litigate the collateral estoppel issues and agree to some sort of sealed discovery of the *Argo* documents. Given the importance of *Argo* to this case, however, the

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4/ "Under California law, '[a] party is collaterally estopped from relitigating an issue previously adjudicated if: (1) the issue necessarily decided in the previous lawsuit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the estoppel is asserted was a party, or in privity with a party, to the previous suit.'" *In re Russell*, 76 F.3d 242, 244-45 (9th Cir. 1996) (quoting *In re Joshua J.*, 39 Cal. App. 4th 984, 46 Cal. Rptr. 2d 491, 497 (Ct. App. 1995)).

district court's 12(b)(6) order on vagueness grounds was premature.

IV. *CONCLUSION*

For the forgoing reasons, we reverse the district court's 12(b)(6) order finding that the FLSA had preempted the appellants' career fraud claims, that the California statute of limitations had run, and that the appellants' claims were too vague. We remand this case for further proceedings.

REVERSED and REMANDED.

APPENDIX B

PHILIP WILLIAMSON, et al., Plaintiffs,
v.
GENERAL DYNAMICS CORPORATION, Defendant,

No. 97-1466-E(AJB)

United States District Court
Southern District of California

April 3, 1998

MEMORANDUM DECISION AND ORDER

ENRIGHT, Judge

BACKGROUND

This first amended complaint (FAC) alleges a class action on four fraud-related theories against General Dynamics. Plaintiffs were employees at the Convair Division who were improperly classified as "salaried exempt" between August 1985 and January 1996. The class includes those employees who were eligible to participate in the settlement of the Fair Labor Standards Act (FLSA) suit, *Sena v. General Dynamics*, but who were told that it would jeopardize their careers to join the suit.

Plaintiffs allege two types of fraud: (1) Fraud I or "wage fraud" and (2) Fraud II or "career fraud." Both types are involved in each of plaintiffs' causes of action for fraud, intentional misrepresentation, negligent misrepresentation, and concealment. As to Fraud I/wage fraud, plaintiff's allege that General Dynamics promised to be "law abiding" and to pay "lawful wages according to laws governing additional compensation for overtime hours." FAC ¶ 17. These promises began in 1985 when General Dynamics sought to prevent the loss of government contracts by implementing a plan to pay its workers proper wages. In the "Ethics Policy," General Dynamics promised to be "honest, trustworthy, law abiding." FAC ¶ 22. Later, General Dynamics emphasized that "Our goal is to abide by the very highest standards of business ethics and conduct." FAC ¶ 24. In a company newsletter, General Dynamics committed itself to treat the employees "fairly and with the dignity and respect due all human beings." FAC ¶ 34. Plaintiffs contend that the promise was false.

As to Fraud II/career fraud plaintiff's allege that General Dynamics misrepresented that the employees had "viable career opportunities at General Dynamics" because the company knew that it was going to close the facility. FAC ¶ 43. For example, in a company newsletter General Dynamics promised to "try to keep you up to date on what is going on out there -- things happening all over the world including Europe and

Washington -- and our views of what it means to our business, to us and to our jobs." FAC ¶ 46. During a speech to managers, the CEO stated "I think we can have a bright future." FAC ¶ 49. In 1993, the newsletter stated that the company would be able to sustain its business "for several years to come" and that they had renewed the building lease through 1999. FAC ¶ 59, 62. In 1994, the vice president affirmatively told the employees that "Let me once again make it clear that we have not been sold, there has been no decision to shut down this plant, and we are continuing our plant to build fuselages for all MD-11s." FAC ¶ 66. These statements led plaintiffs to believe that they had viable careers and that the company would inform them of any plans other than to stay in business. The statements were allegedly false because at the time they were made, the decision to close the plant had already been made. The falsity of these statements was established in the *Argo v. General Dynamics* litigation, now on appeal in state court.

General Dynamics moves to dismiss the FAC on three grounds.

DISCUSSION

I. Failure to State a Claim

General Dynamics asks the court to dismiss the action because the promises of "viable careers" and promises to be "law abidding" are too vague to

state a claim of fraud. Fed. R. Civ. Pro. 12(b)(6). According to General Dynamics, the statements in the FAC are vague generalities selected from an amalgam of company statements spanning several years. "Promises too vague to be enforced will not support a fraud claim any more than they will one in contract." *Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 215-16 (1993) (promises of "appropriate" financial rewards and "active and meaningful" participation in creative decisions were vague), *disapproved on other grounds, Turner v. Anheuser Busch, Inc.*, 7 Cal. 4th 1238 (1994); *Semore v. Pool*, 217 Cal. App. 3d 1087, 1102 (1990) (general statements in employee handbook do not support claim for fraud or misrepresentation). Otherwise, a myriad of employment disputes would be transformed into fraud actions.

The court is persuaded by these arguments and grants the motion to dismiss with prejudice. Although plaintiffs' theory is creative, the allegations are too vague to support the alleged fraud claims. Plaintiffs' view of actionable promises is far broader than the law allows.

II. Statute of Limitations

The statute of limitations on fraud is three years. Cal. Civil Proc. Code § 338(d). This action was filed June 27, 1997. General Dynamics argues that all class members were on notice of the purported fraud in September 1993. At that time

they were invited to join the *Sena* settlement which alleged violations of the FLSA, including the failure to pay overtime.

The court agrees that having been on notice of the alleged fraud in September 1993, plaintiffs' wage fraud claims are time barred. At that time, plaintiffs had the necessary information upon which to conclude that the company had not properly compensated them for all hours worked. *See San Francisco Unified School Dist. v. W.B. Grace & Co.*, 37 Cal. App. 4th 1318, 1326 (1995) (discussing inquiry notice).

III. Preemption by FLSA

General Dynamics argues that the claims, though couched as career and wage fraud, essentially seek overtime pay; therefore, their claims are preempted by FLSA.

Although the authorities are not uniform on this issue, the court agrees with General Dynamics that the plaintiffs' particular claims are preempted. The FLSA is a comprehensive statute, though it allows states to set higher or more generous benefits in the savings clause. 29 U.S.C. § 218. The FLSA is the exclusive remedy for claims that duplicate or are the equivalent of rights protected by the FLSA. *Lerwill v. Inflight Motion Pictures*, 343 F. Supp. 1027 (N.D. Cal. 1972). Here, plaintiffs' career fraud allegations reduce to claims that

General Dynamics would lose their job if they participated in the *Sena* FLSA action. But the FLSA contains a broad provision to protect employees who assert their statutory rights from retaliation and discrimination. 29 U.S.C. § 215(a)(3); *e.g., Soler v. G & U, Inc.*, 690 F.2d 301, 302-03 (2d Cir. 1982) (broadly interpreting the antidiscrimination provision to include an employer's threatening, intimidating, and coercive actions to discourage employees from joining a FLSA lawsuit); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 814-15 (D. Del. 1993). Similarly, the allegations of wage fraud merely restate the fact that they were not paid overtime in compliance with the FLSA.[1/]

The court rejects plaintiffs' arguments to the contrary. Plaintiffs argue that Congress did not intend the FLSA to be preemptive because it allows states to pass more stringent wage and hour laws. 29 U.S.C. § 218(a); *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), *cert. denied*, 117 S. Ct. 1862 (1997). The legislative history also shows Congress recognized the preservation of state laws when the House Report stated, "Actions under common law, or under State statutes for recovery of

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1/ To the extent that plaintiffs attempt to base their claims on California wage statutes, they fail because the California Labor Code is the exclusive remedy for state law wage violations. *Lubner v. Los Angeles*, 45 Cal. App. 4th 525, 530 (1996).

wages are not affected." House Report No. 71, 80th Cong., lst Sess., at 7 (1947). The court rejects these arguments because the statutory language is clear and it is limited to state wage and hour statutes. Even assuming that there may be instances in which a tort claim remains viable, the court concludes that this is not such a case. The very essence of the plaintiffs' claim to a legal wage is embodied in the federal statute. The statute does [not] allow employees to circumvent the statutory remedy by re-labeling their claims as common law torts.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby grants defendant's motion to dismiss the action with prejudice.

APPENDIX C

PHILIP WILLIAMSON, ITZIK RIEF, RONDA KIRLIN, THOMAS PAINTER,
Plaintiffs-Appellants,
v.
GENERAL DYNAMICS CORPORATION,
Defendant-Appellee.

No. 98-55783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 23, 2000, Filed

ORDER

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX D

Excerpts of relevant provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq.

§ 215. Prohibited acts; Prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

* * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * *

§ 216. Penalties

(a) Fines and imprisonment.

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more

than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action.

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The

court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions.

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime

compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it

shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

* * * *

§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor

Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]

(a) if the cause of action accrues on or after May 14, 1947-- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * * *

§ 256. Determination of commencement of future actions

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant--

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear--on the subsequent date on which such written consent is filed in the court in which the action was commenced.

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Supreme Court, U.S.
FILED
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(2)

No. 00-271

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,

Petitioner,

v.

PHILIP WILLIAMSON, ITZIK RIEF,
RONDA KIRLIN and THOMAS PAINTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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September 8, 2000

30P

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

REASONS WHY THE PETITION SHOULD BE DENIED 7

A. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition 7

1. *The Ninth Circuit did not hold that threats of career harm may never constitute retaliation under the FLSA; it held that employees who have not engaged in any form of statutorily-defined protected activity may not prosecute a claim for retaliation under the FLSA* 7

2. *The language of section 215(a)(3) does not support GD's position that it committed actionable retaliation under the FLSA* 8

3. *Because the plaintiffs have no claim for FLSA retaliation, the maintenance of their state fraud claims could not possibly interfere with the intent of Congress* 14

B. Because There Is No Conflicting Authority and the Questions Presented Are Not Important Questions of Federal Law, No Reason Exists for the Grant of Certiorari 16

TABLE OF CONTENTS (Continued)

Page

1. *There is no conflicting authority* 16

   a. No published federal or state decision holds that employees who have not engaged in statutorily-protected activity may bring an action for retaliation under section 215(a)(3) 16

   b. No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3) preempts a common-law fraud claim 18

2. *The question whether the FLSA preempts a state fraud claim has not arisen in the 62-year history of the FLSA* 19

C. It Is Unnecessary To Decide in This Case Whether a Victim of Retaliation May Recover Punitive Damages 19

CONCLUSION 25

APPENDIX

Relevant portions of sections 215 and 216 of the Fair Labor Standards Act, 29 U.S.C. §§ 215-216 (1938) A-1

TABLE OF AUTHORITIES

Page

CASES

Ball v. Memphis Bar-B-Q Co., Inc.,
34 F.Supp.2d 342 (E.D. Va. 1999) 12-14

Boardman v. Estelle
957 F.2d 1523 (9th Cir. 1992) 9

Bolick v. Brevard County Sheriff's Dep't
937 F.Supp 1560 (M.D. Fla. 1996) 20

Canfield v. United States
14 Cl.Ct. 687 (Cl.Ct. 1988) 10

Contreras v. Corinthian Vigor Ins. Brokerage, Inc.
25 F.Supp.2d 1053 (N.D.Cal. 1998) 19-20

Cross v. Bally's Health & Tennis Corp.
945 F.Supp. 883 (D. Md. 1996) 9, 11

Delta Air Lines, Inc. v. August
450 U.S. 346 (1981) 10

English v. General Elec. Co.
496 U.S. 72 (1990) 4-5

Helvering v. Stockholms Enskilda Bank
293 U.S. 84 (1934) 23

TABLE OF AUTHORITIES (Continued)

Page

Hillsborough County v. Automated Medical Laboratories, Inc.
471 U.S. 707 (1985) 5

Hines v. Davidowitz
312 U.S. 52 (1941) 5

Kruse v. Bank of America
202 Cal.App.3d 38 (1988) 22

Kuhn v. Philadelphia Elec. Co.
475 F.Supp. 324 (E.D. Pa. 1979) 10

Lambert v. Ackerley
180 F.3d 997 (9th Cir. 1999) 8

Legutko v. *Local 816, Int'l Bhd. of Teamsters*
606 F.Supp. 352 (E.D.N.Y. 1985) 18

Lerwill v. Inflight Motion Pictures, Inc.
343 F.Supp. 1027 (N.D. Cal. 1972) 3

Martin v. American Int'l Knitters Corp.
Civ. A. No. 91-0027, 1992 WL 108832
(N. Mariana Islands 1992) 20

McCray v. New York
461 U.S. 961 (1983) 24

TABLE OF AUTHORITIES (Continued)

Page

O'Brien v. Dekalb–Clinton Counties Ambulance Dist.
No. 94-6121-CV-SJ-6, 1996 WL 565817
(W.D. Mo. 1996) 20

Partenweederei, MS Belgrano v. Weigel
313 F.2d 423 (9th Cir. 1962) 9

Perez v. Z Frank Oldsmobile, Inc.
Nos. 99-2742, 00-1786, 99-2854, 00-1701,
2000 WL 1049185 (7th Cir. 2000) 22

Pommier v. James L. Edelstein Enters.
816 F.Supp. 476 (N.D. Ill. 1993) 20

Raya-Ledesma v. INS
55 F.3d 418 (9th Cir. 1995) 9

Rice v. Sioux City Memorial Park Cemetery
349 U.S. 70 (1955) 19

Sena v. General Dynamics Corp.
No. 91-00965-B (AJB) (S.D. Cal.) 1-2, 6, 10

Shea v. Galaxie Lumber & Constr. Co., Ltd.
152 F.3d 729 (7th Cir. 1998) 19

Silkwood v. Kerr-McGee Corp.
464 U.S. 238 (1984) 5

TABLE OF AUTHORITIES (Continued)

Page

Snapp v. Unlimited Concepts, Inc.
208 F.3d 928 (11th Cir. 2000) 6, 21-22, 24

Soler v. G & U, Inc.
690 F.2d 301 (2d Cir. 1982) 3, 16-18

Soto v. Adams Elevator Equip. Co.
941 F.2d 543 (7th Cir. 1991) 19

Strickland v. MICA Information Sys.
800 F.Supp. 1320 (M.D.N.C. 1992) 9, 11

Travis v. Gary Community Mental Health Ctr., Inc.
921 F.2d 108 (9th Cir. 1990) 6, 19, 21-22, 24

Wertheim v. State of Arizona
No. CIV 92-453 PHX RCB, 1993 WL 603552
(D. Ariz. Sept. 30, 1993) 10

Youakim v. Miller
425 U.S. 231 (1976) 11

STATUTES

Cal. Code Civ. Proc., § 1021 22

29 U.S.C. § 207(a)(1) 18

29 U.S.C. § 215 1

TABLE OF AUTHORITIES (Continued)

Page

29 U.S.C. § 215(a)(3) 2-3, 5-6, 8-18, 21, 23

29 U.S.C. § 216 1

29 U.S.C. § 216(a) 23-24

29 U.S.C. § 216(b) 10, 19, 24

29 U.S.C. § 256(b) 10

RULES

FED. R. APP. P. 35(a)(2) 19

FED. R. CIV. P. 12(b)(6) 1-2, 10

Supreme Court Rule 10 16

OTHER AUTHORITIES

Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983) 24

Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (The Rutter Group 2000) ¶ 11.35, p. 11-4 9-10

2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 47.22, pp. 297-304 23

The respondents, Philip Williamson, Itzik Rief, Ronda Kirlin, and Thomas Painter ("plaintiffs"), respectfully request that the petition for writ of certiorari filed by petitioner General Dynamics Corporation ("GD") be denied.

STATUTORY PROVISIONS INVOLVED

Relevant portions of sections 215 and 216 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C., §§ 215-216 (1938), are reproduced in Appendix A.

STATEMENT OF THE CASE

This is a pleading case. The appeal arises from a district court order dismissing a state law fraud action with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Pet., App. B. The Ninth Circuit reversed and remanded the case for trial. Pet., App. A, p. 31a.

The plaintiffs were employees of the Convair Division of GD who had worked overtime for which they had not been compensated. In the fall of 1993, they were eligible to participate in a negotiated settlement of an FLSA class action entitled, *Sena v. General Dynamics Corp.*, No. 91-0965-B (AJB) (S.D. Cal.) ("*Sena*").

At that time, unbeknownst to the plaintiffs, GD planned to close the Convair plant and to eliminate their jobs. However, GD was economically motivated to reduce its liability in *Sena* by discouraging employees from opting in and participating in the settlement of that case. Placing corporate profits above its ethical obligation to employees whose jobs were soon to be eliminated, it falsely represented to the plaintiffs and other employees that (1) they had promising job and career opportunities at Convair and (2) those opportunities would be harmed by opting into *Sena*. In reliance upon those false representa-

tions, and preferring secure, long-term employment to participation in the *Sena* settlement, the plaintiffs chose not to opt into *Sena*.

Significantly, at the time GD made its false representations, the plaintiffs had not engaged in any employee activity protected by the anti-retaliation provision of the FLSA (29 U.S.C. § 215(a)(3)) ("section 215(a)(3)"); App. A, p. A-1). Pet., App. A, pp. 15a-17a. Specifically, they had not "filed any complaint or instituted or caused to be instituted any proceeding" under the FLSA; they had not "testified" nor were they "about to testify in any such proceeding"; and they had not "served" nor were they "about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

The gravamen of the plaintiffs' fraud claim is not that GD violated the FLSA by failing to pay overtime wages, by retaliating against them, or otherwise. The gravamen of their claim is that they detrimentally relied on GD's false representations regarding their career opportunities. They were induced by deceit to forfeit their contractual rights, as potential members of the *Sena* class and as third party beneficiaries of the *Sena* settlement agreement, to receive monetary settlement payments from GD.

The plaintiffs sued GD solely for common law fraud under state law. Pet., App. B, pp. 32a-34a. GD moved for dismissal of those claims pursuant to Federal Rule of Civil Procedure section 12(b)(6), arguing essentially that: (1) the fraudulent threats of career harm alleged by the plaintiffs constituted unlawful retaliation under the FLSA (29 U.S.C. § 215(a)(3)), and (2) even though the plaintiffs had not alleged FLSA retaliation claims (and could not do so because any such claims were time-barred), the plaintiffs' state law fraud claims were preempted by federal law, because (a) the federal remedies

for conduct prohibited by the FLSA are limited and exclusive and (b) the prosecution of claims for broader fraud remedies under state common law would interfere with the intent of Congress in adopting section 215(a)(3). Relying on cases cited by GD which did not even involve the constitutional doctrine of federal preemption,[1] the district court agreed that the plaintiffs had unpleaded, time-barred, retaliation claims under section 215(a)(3), and their state law claims for fraud were therefore preempted by the FLSA. Pet., App. B, pp. 36a-38a.[2]

On the plaintiffs' appeal, the Ninth Circuit held in relevant part that (1) the plaintiffs never had a valid claim for FLSA retaliation because they had not engaged in any activity protected by section 215(a)(3) at the time of GD's fraud (Pet., App. A, pp. 15a-17a) and, therefore, (2) "there is no conflict preemption because the anti-retaliation does not apply" (Pet., App. A, pp. 7a-25a, 20a). Accordingly, the court reversed the district court's order of dismissal and remanded the case for trial. *Id.*, p. 31a.

As the Ninth Circuit correctly observed, the essence of the plaintiffs' claim is garden-variety fraud, not FLSA retaliation:

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[1] *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp. 1027 (N.D. Cal. 1972); *Soler v. G & U, Inc.*, 690 F.2d 301 (2d Cir. 1982). As the Ninth Circuit explained, *Lerwill* "never mentions the word 'preemption,' and it does not rely on a preemption framework." Pet., App. A, p. 19a. Neither does *Soler*.

[2] The district court dismissed the action with prejudice and did not afford the plaintiffs even a single opportunity to allege a claim for retaliation under the FLSA, which the court had ruled was preemptive of state law. *Id*, p. 38a.

> there is a simpler way to look at the preemption issues in this case. The [plaintiffs'] career fraud claims are nothing more than fraud claims about a plant closing. . . . This case is about whether GD is guilty of fraud and misrepresentation because of its statements about the [plaintiffs'] "career jobs" and about not closing the Convair Division. The *Sena* settlement of the FLSA claims was merely an impetus for this alleged fraud . . . . Pet., App. A, pp. 24a-25a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The primary question presented is whether the plaintiffs' state law fraud claims are preempted by the FLSA.[3] GD has no quarrel with the Ninth Circuit's holding that there is neither *express* preemption of state law by the FLSA nor *field* preemption of state wage and hour law, much less state tort law, by the FLSA. Pet., App. A, pp. 14a-15a, 20a. It contends that the plaintiffs' claims are preempted under the doctrine of *obstacle* preemption, a disfavored subspecies of *conflict* preemption.[4]

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[3]Federal preemption of state law can occur in three circumstances: (1) where Congress expressly specifies that its enactment preempts state law (*express* preemption); (2) where there is a scheme of federal regulation so pervasive that there is a reasonable inference that Congress intended to dominate the field, and state laws on the same subject are precluded (*field* preemption); and (3) where federal law actually conflicts with state law (*conflict* preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); Pet., App. A, p. 8a.

[4]This Court has found *conflict* preemption in two types of situations: (1) "where it is impossible for a private party to comply with both state and federal requirements" (*actual* conflict preemption) or (2) where state law "stands as an obstacle to the accomplishment and execution

Essentially, GD argues that the prosecution of the plaintiffs' state law fraud claims would interfere with the intent of Congress because the federal procedural and substantive remedies for FLSA retaliation are more limited than the state procedural and substantive remedies for fraud. Pet. pp. 19-27. Such argument, which *assumes* that the plaintiffs possessed valid claims for retaliation under section 215(a)(3) of the FLSA, begs the critical legal question decided adversely to GD by the Ninth Circuit. The Ninth Circuit held that GD's alleged conduct did *not* constitute actionable retaliation under the FLSA. Pet., App. A, pp. 15a-17a, 20a. Because the plaintiffs possessed no actionable claim for retaliation, the intent of Congress in enacting section 215(a)(3) is not even implicated, much less impeded, by the prosecution of the plaintiffs' state law fraud claims. Neither the record nor the opinion of the Ninth Circuit present the preemption questions raised in GD's petition.

The Ninth Circuit correctly determined that GD's fraudulent conduct did not constitute actionable retaliation under the FLSA. The plaintiffs did not allege, nor could they have alleged, that they had engaged in any activity protected by

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of the full purposes and objectives of Congress" (*obstacle* preemption). *English v. General Elec. Co.*, *supra*, 496 U.S. at p. 79, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

The Court "has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'" *English* v. *General Elec. Co.*, *supra*, 496 U.S. at p. 90. "'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, [courts] must look for special features warranting pre-emption.'" *Id.* at p. 87, quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985).

section 215(a)(3) before GD made false threats that their careers would be harmed if they asserted their FLSA rights by opting into *Sena*. Pet., App. A, pp. 15a-17a.

Furthermore, because fraud and retaliation are fundamentally different wrongs, and because the damage remedies for FLSA retaliation are actually broader than the damage remedies for fraud under state law, the prosecution of the plaintiffs' fraud claims could not possibly interfere with the intent of Congress in enacting section 215(a)(3).

This case involves neither a conflict among circuits nor an important question of federal law. In the 62-year history of the FLSA, no court, applying doctrinal preemption analysis, has ever held that a state law fraud claim is preempted by that Act. No court has ever adopted the interpretation of section 215(a)(3) which is the unstated foundation for GD's arguments, *viz.*, that, even when employees have not previously engaged in activity protected by the statute, an employer commits actionable retaliation whenever it engages in conduct inimical to the assertion of FLSA rights. Such an interpretation strains the language of section 215(a)(3) to the breaking point.

Finally, because the plaintiffs have not alleged a claim for FLSA retaliation and could not do so, it is unnecessary in this case to resolve a conflict between two circuits regarding whether a victim of such retaliation may recover punitive damages. *Compare Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111-112 (9th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991), *with Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-939 (11th Cir. 2000).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither the Decision Below Nor the Record Raises the Questions Presented in the Petition.

1. *The Ninth Circuit did not hold that threats of career harm may never constitute retaliation under the FLSA; it held that employees who have not engaged in any form of statutorily-defined protected activity may not prosecute a claim for retaliation under the FLSA.*

The questions presented are premised upon a serious distortion of the Ninth Circuit's opinion. GD erroneously argues the Ninth Circuit held that an employer's "threats of future economic retaliation are not covered by the FLSA." Pet. pp. 9, 12-19. That is not what the court held. The Ninth Circuit held that the plaintiffs had no actionable retaliation claim because *they had not engaged in any statutorily-protected activity at the time that GD threatened harm to their careers.*

Specifically, the Ninth Circuit reasoned and held:

> In this case, the [plaintiffs] never filed a complaint with an agency or the courts. They never complained to their supervisors of a FLSA violation or notified the Department of Labor. They never instituted or caused to be instituted any proceedings because they were not parties to the class-action litigation in *Sena*. They were invited to opt-into that lawsuit, but relied on GD's allegedly fraudulent assertions that they held career jobs and that the Convair

> Division would remain open. The [plaintiffs] argue the fraud occurred after the failure to pay overtime and after *Sena* settled the FLSA claims. Thus, even under *Lambert*[5] GD's allegedly fraudulent conduct would not be actionable under the anti-retaliation provision. Pet., App. A, pp. 16a-17a.

The dispositive issue was the lack of prior protected employee activity, not the lack of employer conduct that might constitute unlawful, retaliatory "discrimination" under section 215(a)(3).

2. *The language of section 215(a)(3) does not support GD's position that it committed actionable retaliation under the FLSA.*

Section 215(a)(3) of Title 29 makes it unlawful for any person:

> to discharge or in any other manner discriminate against any employee *because* such employee has [1] filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or [2] has testified or is about to testify in any such proceeding, or [3] has served or is about to serve on an industry

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[5]In *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 936 (2000), the Ninth Circuit, sitting en banc,

> "held that the FLSA's anti-retaliation provision protects not only employees who have filed complaints in court or with an agency such as the Department of Labor but also employees who have complained to their employers." Pet., App. A, p. 12a.

committee . . . . (Italics added.)

In order to establish a prima facie case of retaliation under the FLSA, the plaintiff must establish that: (1) he or she engaged in certain protected activity of which the employer was aware; (2) the employer took proscribed adverse employment action against the plaintiff; and (3) the two elements are related causally. *Cross v. Bally's Health & Tennis Corp.*, 945 F.Supp. 883, 888 (D. Md. 1996); *Strickland v. MICA Information Sys.*, 800 F.Supp. 1320, 1323 (M.D.N.C. 1992).

The Ninth Circuit correctly determined that the plaintiffs had not alleged they had engaged in any protected employee activity before GD made its false representations, and for that reason they had no actionable claim for retaliation. Pet., App. A, pp. 15a-17a.

In its petition, GD argues that the plaintiffs were protected by section 215(a)(3) because they were "about to testify" in *Sena* by submitting claim forms under oath. Pet. p. 18. For numerous reasons, that claim of protected employee activity is mistaken.

First, that contention was not expressly considered by the Ninth Circuit because it was raised for the first time in GD's petition for rehearing and petition for rehearing en banc. Circuit courts ordinarily do not consider issues raised in such an untimely manner[6]; and "[o]rdinarily, this Court does not decide

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[6]In the Ninth Circuit, parties generally may not assert new issues or arguments in a petition for rehearing. *Raya-Ledesma v. INS*, 55 F.3d 418, 420, n.1 (9th Cir. 1995); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *cert. denied*, 506 U.S. 904; *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 424-425 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963) (explaining the sound policy supporting the general rule); Goelz

questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Second, the plaintiffs did not allege that they were "about to testify" (29 U.S.C. § 215(a)(3)) in their first amended complaint. CR 23, 1 ER 146-164. Because GD's contention is premised on a fact beyond the operative pleading, such a contention cannot provide a basis to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Third, the plaintiffs were not required to submit a claim form under oath in order to opt into *Sena*. Neither 29 U.S.C. § 216(b) nor 29 U.S.C. § 256(b) requires that a consent to join an FLSA class action be under oath. Each statute merely requires a plaintiff's written consent. Courts have held that such consent may not even require the plaintiff's signature (*Wertheim v. State of Arizona*, No. CIV 92-453 PHX RCB, 1993 WL 603552, at *8 (D. Ariz. Sept. 30, 1993) ("the court notes that section 256(b) does not require persons wishing to opt in to submit signed consent forms"); *Canfield v. United States*, 14 Cl.Ct. 687, 688, 692 (Cl.Ct. 1988)) and does not require notarization (*Kuhn v. Philadelphia Elec. Co.*, 475 F.Supp. 324, 327 (E.D. Pa. 1979)). GD has failed to cite any case holding that such consent must be filed under oath.

Fourth, GD's interpretation of the phrase "about to testify" in section 215(a)(3) is legally erroneous. In GD's view, any employee who is *capable* of giving testimony in support of his or her own unasserted overtime claim is "about to testify"

& Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (The Rutter Group 2000) ¶ 11.35, p. 11-4.

and is therefore protected by the anti-retaliation provision, even if (1) the employee has never asserted his or her FLSA rights, formally or informally, and (2) the employer is unaware whether the employee has any intention to testify. In GD's view, all employees with meritorious overtime claims are protected by the anti-retaliation provision. The argument, which would greatly expand employer liability, contradicts the language of section 215(a)(3).

The statute is not nearly so broad. Section 215(a)(3) prohibits employers from discharging or otherwise discriminating against an employee "because" the employee "is about to testify." For such a *causal* relationship to exist, an employer must at least be *aware* of an employee's existing intention to testify. *Strickland v. MICA Information Sys., supra*, 800 F.Supp. at p. 1323; *see Cross v. Bally's Health & Tennis Corp., supra*, 945 F.Supp. at p. 888. The apparent purpose of Congress in enacting the "about to testify" language was to prevent employer retaliation against an employee who (1) had manifested his or her intention to give testimony adverse to the employer or at least (2) had been subpoenaed or scheduled to testify. It was not the apparent purpose of Congress to cloak all employees who might seek to establish their FLSA rights by means of future testimony with the protection of section 215(a)(3). If the intent of Congress were so broad, the first clause of the statute, which protects an employee who has "filed any complaint or instituted or caused to be instituted any proceeding," would be superfluous, for any such employee would also be "about to testify."

Even assuming for the sake of argument only that submitting an FLSA class action settlement claim form under oath constitutes "testify[ing]" for the purpose of the anti-retaliation statute, the plaintiffs never alleged that GD was aware of their intention to submit such a form. Without such

employer awareness, the plaintiffs could not allege or prove that they had been threatened "because" they were "about to testify"; they could not state a retaliation claim under section 215(a)(3).

In *Ball v. Memphis Bar-B-Q Co., Inc.*, 34 F.Supp.2d 342 (E.D. Va. 1999), the district court was required to consider the sufficiency of a retaliation claim based upon the "about to testify" clause in section 215(a)(3). During the course of the plaintiff's employment, he learned that a coworker was preparing to bring an FLSA action against the defendant employer because the employer, to avoid paying overtime, had turned back the clock on the computerized timekeeping system that tracked hours worked. *Id.* at p. 343. The plaintiff, Ball, informed the employer's president, Sorin, about the situation. *Ibid.* Sorin met with Ball and suggested a certain set of facts for Ball to testify to if the FLSA action were filed. *Ibid.* Ball disagreed with those facts and refused to testify as Sorin desired. *Ibid.* Five days later Ball was fired because he would not agree to testify as his employer wanted. *Ibid.*

The district court dismissed Ball's complaint for failure to state a claim, holding that the FLSA's anti-retaliation clause did not apply. Interpreting the phrase "has testified or is about to testify in any such proceeding" (29 U.S.C. § 215(a)(3)), the court held that "an individual can only receive the benefit" of the quoted language "when [he or] she has testified in an FLSA proceeding or is *scheduled to testify* in a then-pending proceeding." *Id.* at p. 345 (italics added). Explaining the key word, "about," the court stated:

> "About" refers to something that, while not necessarily imminent, is at least *relatively certain* and near in time. See Black's Law Dictionary 7 (5th ed. 1979) (defining "about" as

> "near in time, quantity, number, quality, or degree. Substantially, approximately, almost, or nearly"). *Ibid.* (italics added).

Thus, "about to testify," as used in section 215(a)(3), means the employer is aware that it is "relatively certain" that the employee will testify; it does not mean that the employer is aware that the employee is "capable of giving testimony." Accordingly, the court deciding *Ball* reasoned, in part,[7] that the plaintiff

> ha[d] failed to allege that he was "about" to testify. The Complaint state[d] only that he informed Sorin "about how he would testify if he were deposed as part of a lawsuit." . . . *The Complaint fail[ed] to allege that plaintiff was subpoenaed to testify or even that he was told he would be called upon to testify*, much less any statement as to when such testimony might occur. *Ibid.* (italics added).

Here, as in *Ball*, the plaintiffs were never "scheduled to testify," "subpoenaed to testify," or even "told [they] would be called upon to testify." *Ibid.* The mere fact that they were *capable* of testifying in *Sena* does not establish that they were "about to testify" for the purpose of alleging a viable claim for retaliation under section 215(a)(3).

In *Ball*, the employee could not state a claim even though the employer's president knew that he had refused to

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[7]The district court also held that "[a] lawsuit that is merely threatened or inchoate simply has not ripened into a proceeding to which the second clause of § 215(a)(3) would apply." *Id.* at pp. 345-346.

give testimony favorable to the employer and would be an adverse witness *if* he ever testified. If the plaintiff in *Ball* could not state a retaliation claim on the ground he was discharged "because" he was "about to testify" (29 U.S.C. § 215(a)(3)), then the plaintiffs in this case could not state a retaliation claim on the ground they were threatened "because" they were "about to testify."

GD has not cited the circuit court opinion, the record, its appellate brief, or any legal authority in support of its argument that section 215(a)(3) applied to the plaintiffs because they were "about to testify." Pet p. 18. For any number of reasons, such an argument is meritless.

In short, the plaintiffs, who engaged in no employee activity protected by section 215(a)(3), could not possibly have been the victims of unlawful "retaliation." Such retaliation is defined as specified, employer conduct—"discharge" or "discrimination"—which is a *causally-related*, employer response to prior, specified, employee activity. By enacting section 215(a)(3), Congress prohibited employers from retaliating against employees who had asserted, or were about to assert, FLSA rights by filing a complaint, instituting a proceeding, testifying, or serving on an industry committee. It did not prohibit all employer conduct inimical to the assertion of FLSA rights. The statute cannot possibly be interpreted so broadly, and no court has ever done so.

3. *Because the plaintiffs have no claim for FLSA retaliation, the maintenance of their state fraud claims could not possibly interfere with the intent of Congress.*

The Ninth Circuit correctly held the plaintiffs can state a state law claim for fraud but cannot state an actionable claim

for FLSA retaliation. That being so, GD's contrived claim of *obstacle* preemption is without any merit. The FLSA does not permit, prohibit, or even mention employer fraud. The intent of Congress in enacting section 215(a)(3) is not even implicated, much less impeded or impaired, by the prosecution of the plaintiffs' state law fraud claims.

B. Because There Is No Conflicting Authority and the Questions Presented Are Not Important Questions of Federal Law, No Reason Exists for the Grant of Certiorari.

In relevant part, Supreme Court Rule 10 authorizes review of a circuit court decision that (1) conflicts with another circuit court decision "on the same important matter"; (2) decides "an important federal question" in a way that conflicts with a decision of a state court of last resort; (3) in some other way calls for the exercise of this Court's supervisory power, or (4) presents "an important question of federal law" that has not been, but should be, decided by this Court or has been decided "in a way that conflicts with relevant decisions of this Court." This case meets none of those criteria.

1. *There is no conflicting authority.*

a. No published federal or state decision holds that employees who have not engaged in statutorily-protected activity may bring an action for retaliation under section 215(a)(3).

GD has not cited any federal or state decision holding that an employer's threat of career harm that is made before any employee activity protected by section 215(a)(3) constitutes actionable retaliation. The Ninth Circuit's holding that it does not is the only conclusion that may be drawn from the language of the statute.

GD argues that the Ninth Circuit's holding that an employer's "threats of future economic retaliation are not covered by the FLSA" (Pet. pp. 9, 12-19) conflicts with the decision of the Second Circuit in *Soler v. G & U, Inc.*, *supra*,

690 F.2d 301, 302-303 (2d Cir. 1982). Pet. pp. 17-18. However, as explained above, the Ninth Circuit did not hold that threats of future economic retaliation are never actionable under section 215(a)(3), and its holding that employees who have not engaged in any statutorily-protected activity may not assert a claim for retaliation is not inconsistent with *Soler*.

The facts of *Soler* are readily distinguishable from the facts of this case. In *Soler*, migrant farm-workers brought an action under the FLSA to recover wage deductions for housing in labor camps. 690 F.2d at p. 302. That action—the filing of a formal complaint—constituted employee activity protected by section 215(a)(3). They amended their complaint to allege retaliatory discrimination in violation of section 215(a)(3), claiming that the defendant had coerced several plaintiffs to withdraw from the lawsuit by means of threats. *Ibid.* When they sought a preliminary injunction prohibiting such conduct, the district court denied the injunction on the grounds that (1) "[n]one of the farmworkers experienced or were threatened with any adverse change in employment," i.e., as a matter of fact there had been no threats by the employer, and (2) no irreparable harm in the absence of an injunction had been shown. *Ibid.* Finding that "the district court did not abuse its discretion in concluding that plaintiffs were unlikely to succeed on the merits of their claim under section 215(a)(3), and that no irreparable harm would result from denial of the preliminary injunction," the Second Circuit affirmed. *Id.* at pp. 302-303.

In that procedural context, the court stated, "[u]ndoubtedly, threats of retaliation are also prohibited by [section 215(a)(3)], as are efforts to obtain withdrawal of FLSA claims by threats of retaliation. Cf. EEOC v. Kenosha Unified School District No. 1, 620 F.2d 1220, 1228 (7th Cir. 1980) (finding no threat of retaliation)." *Id.* at pp. 302-303. However, for several reasons, that statement does not conflict with the holding of the

Ninth Circuit in this case. *First*, since the district court found that no employment threats had in fact been made, the Second Circuit's statement is dictum. *Second*, and more importantly, since the *Soler* plaintiffs had already filed an action under the FLSA when the alleged threats were made, the Second Circuit could only have been referring to threats of retaliation made by an employer *after* the filing of formal FLSA claims, i.e., after employee activity protected by section 215(a)(3). In this case, GD cannot identify any allegation of protected employee activity which triggered the applicability of the anti-retaliation statute.[8]

b. No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3) preempts a common-law fraud claim.

No published federal or state decision, applying doctrinal preemption analysis, holds that section 215(a)(3), or any other provision of the FLSA, preempts a common-law fraud claim.

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[8]In *Legutko* v. *Local 816, Int'l Bhd. of Teamsters*, 606 F.Supp. 352, 358-359 (E.D.N.Y. 1985), which is also cited by GD (Pet. p. 18), a district court judge held that an employee's circulation of a petition requesting a union to prevent a perceived violation of the FLSA's overtime provision (29 U.S.C. § 207(a)(1)) was a protected activity under section 215(a)(3), even though the employee had not filed any formal complaint or instituted any formal proceeding. The court further held that the employee's allegation that his employer threatened to discharge him for such activity stated an anti-retaliation claim for which limited relief might be granted, even though the employer had not, in fact, discharged the employee. As in *Soler*, the employer threat occurred only *after* the employee had engaged in statutorily-protected activity involving the assertion of FLSA rights.

2. *The question whether the FLSA preempts a state fraud claim has not arisen in the 62-year history of the FLSA.*

The Ninth Circuit recognized that the issue "whether the FLSA preempts a common-law fraud claim" was "an issue of first impression." Pet., App. A, p. 7a. However, there is a spacious difference between novelty and importance. The issue presented must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The FLSA was enacted in 1938. If the issue whether that Act preempts a common-law fraud claim has not previously arisen in 62 years, the issue is simply not an important, recurrent federal question that warrants the attention of this Court.

Circuit courts may sit en banc to resolve "a question of exceptional importance." FED. R. APP. P. 35(a)(2). When GD petitioned for rehearing en banc, no active judge of the Ninth Circuit even "requested a vote on whether to rehear the matter en banc." Pet., App. C, p. 39a.

C. It Is Unnecessary To Decide in This Case Whether a Victim of Retaliation May Recover Punitive Damages.

In *Travis v. Gary Community Mental Health Ctr., Inc.*, *supra*, 921 F.2d 108, 111-112 (7th Cir. 1990) ("*Travis*"), the Seventh Circuit held that the remedies available for retaliation under section 216(b) of the FLSA, as amended in 1977, include punitive damages. For ten years, no other circuit disagreed and *Travis* was followed almost uniformly. *See, e.g., Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729, 734-736 (7th Cir. 1998); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d

543, 551-552 (7th Cir. 1991); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053, 1059-1060 (N.D.Cal. 1998) (denying motion to strike claim for punitive damages in FLSA retaliation action); *O'Brien v. Dekalb–Clinton Counties Ambulance Dist.*, No. 94-6121-CV-SJ-6, 1996 WL 565817, at *6 (W.D. Mo. 1996); *Pommier v. James L. Edelstein Enters.*, 816 F.Supp. 476, 483 (N.D. Ill. 1993); *Martin v. American Int'l Knitters Corp.*, Civ. A. No. 91-0027, 1992 WL 108832, at *2 (N. Mariana Islands 1992) (denying motion to strike claim for punitive damages in FLSA retaliation action brought by the Secretary of Labor); *but see Bolick v. Brevard County Sheriff's Dep't*, 937 F.Supp 1560, 1566-1567 (M.D. Fla. 1996).

The Ninth Circuit observed in this case:

> . . . GD's allegedly fraudulent conduct was not covered by a FLSA provision. Nor are the [plaintiffs] in this case avoiding the FLSA in order to seek a more favorable remedy. The FLSA's anti-retaliation provision actually offers *broader* remedies than state fraud claims because the anti-retaliation provision allows the recovery of attorneys' fees. The other remedies are the same. In 1977, Congress amended section 216(b) to allow plaintiffs who prove retaliation under section 215(a)(3) to obtain "legal and equitable relief" under state law. At least one other circuit has interpreted this relief to include compensatory, punitive, and emotional distress damages. *See, e.g., Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993); *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). Pet., App. A, pp. 19a-20a (footnote omitted, italics added).

However, one week before the Ninth Circuit filed its opinion, the Eleventh Circuit held in *Snapp v. Unlimited Concepts, Inc.*, *supra*, 208 F.3d 928, 933 (11th Cir. 2000) ("*Snapp*"), that punitive damages are not recoverable for retaliation. GD did not cite *Snapp* in its petition for rehearing and rehearing en banc, and, from all that appears, the Ninth Circuit was unaware of that case and did not have the opportunity to compare the reasoning of *Travis* and *Snapp*.

For numerous reasons, this case is not an appropriate vehicle to resolve the conflict between *Travis* and *Snapp*.

First, because the plaintiffs have not even alleged a claim for FLSA retaliation in this case, and could not do so, the issue whether a victim of retaliation may recover punitive damages is tangential at best.

Second, the Ninth Circuit's observation that *Travis* permits the recovery of punitive damages for retaliation is dictum that is not essential to its judgment. The Ninth Circuit's primary holding was that employees who have not engaged in activity protected by section 215(a)(3) may not state a claim for retaliation (Pet., App. A, pp. 15a-17a); consequently, there is "no conflict preemption because the anti-retaliation provision does not apply" (*id.*, p. 20a). If the plaintiffs have no federal retaliation claim, their common-law fraud claim does not even implicate, much less impede, the intent of Congress in adopting section 215(a)(3). *Travis* was cited in support of the court's alternative and nonessential reasoning that the plaintiffs were not "avoiding the FLSA in order to seek a more favorable remedy." Pet., App. A, pp. 19a-20a. If the remedies for FLSA retaliation are actually "broader" (Pet., App. A, p. 19a) than the

remedies for common-law fraud,[9] as they are, even if the plaintiffs possessed an actionable retaliation claim, the prosecution of the plaintiffs' state law fraud claims could not possibly interfere with the intent of Congress, as GD contends.

Third, though the conflict between *Travis* and *Snapp* is real, it is a very immature conflict that may well be resolved through further examination of the issue by other circuit courts. It took 23 years—from the time section 216(b) was amended in 1977 to the present—for this conflict even to materialize. Neither the Court of Appeals for the Seventh Circuit, which decided *Travis*, nor any other circuit court has critically examined the contrary reasoning of *Snapp*. *See Perez v. Z Frank Oldsmobile, Inc.*, Nos. 99-2742, 00-1786, 99-2854, 00-1701, 2000 WL 1049185, at *2 (7th Cir. 2000).

Fourth, because *Travis* is correct and *Snapp* is mistaken, the conflict does not undermine the result in this case. As later illumination of the issue in the circuit courts will undoubtedly reveal, *Snapp* rests upon a misapplication of the doctrine of ejusdem generis. The Eleventh Circuit, focusing myopically on the language of section 216(b), reasoned that, because the remedies enumerated in that section ("employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages") were all compensa-tory in nature,[10] the general phrase "such legal or

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[9]Under California law, in a typical fraud case involving pecuniary injury "[e]motional distress is not recoverable as an element of damages." *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67 (1988). And fraud plaintiffs usually may not recover their attorney's fees. Cal. Code Civ. Proc., § 1021.

[10]It is not obvious that the permissible remedy of "promotion" is necessarily compensatory.

equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3)" must be interpreted narrowly to exclude "legal . . . relief" which is not compensatory, such as punitive damages. 208 F.3d at pp. 933-934.

However, one of the recognized qualifications to the doctrine of ejusdem generis is that general words are not restricted in meaning to objects of the same kind if there is a clear manifestation of a contrary legislative intent. 2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 47.22, pp. 297-304. As this Court well cautioned in *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934):

> while the rule [of ejusdem generis] is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of ejusdem generis is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail.

Employer retaliation under section 215(a)(3) is a crime as well as a tort. Section 216(a) of Title 29 imposes criminal penalties—fines and imprisonment—for employer retaliation. Congress plainly intended that retaliation should have punitive consequences, i.e., consequences which serve the goals of

punishment and deterrence of the offender. By adopting section 216(a), Congress clearly revealed its intent that punishment of the wrongdoer is "appropriate to effectuate the purposes of section 215(a)(3)" (29 U.S.C. § 216(b)). The Eleventh Circuit's interpretation of section 216(b) to exclude punishment of the wrongdoer in the form of punitive damages is contrary to that manifest intent. If employer retaliation is viewed by Congress as an offense *to society* deserving of *criminal* punishment, Congress must have viewed such conduct as an offense *to the victim* deserving of *civil* punishment in the form of punitive damages.

In short, the conflict between *Travis* and *Snapp* is a tolerable conflict on an issue that requires "further study" in lower courts "before it is addressed by this court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.); Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) (articulating the Court's policy "of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question").

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RELEVANT PORTIONS OF SECTIONS 215 AND 216 OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. §§ 215-216 (1938)

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person. . . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; . . . .

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum

wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstate-ment, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.